No. 09-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, LEICESTER TOWN SCHOOL DISTRICT, NESHOBE ELEMENTARY SCHOOL DISTRICT, OTTER VALLEY UNION HIGH SCHOOL, RUTLAND NORTHEAST SUPERVISORY UNION, PITTSFORD TOWN SCHOOL DISTRICT, SUDBURY TOWN SCHOOL DISTRICT, WHITING TOWN SCHOOL DISTRICT, THE NATIONAL EDUCATION ASSOCIATION, THE CONNECTICUT EDUCATION ASSOCIATION, THE ILLINOIS EDUCATION ASSOCIATION, THE INDIANA STATE TEACHERS ASSOCIATION, THE MICHIGAN EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE, THE OHIO EDUCATION ASSOCIATION, THE READING EDUCATION ASSOCIATION, THE TEXAS STATE TEACHERS ASSOCIATION, THE UTAH EDUCATION ASSOCIATION, and the VERMONT NEA,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 9527(a) of the No Child Left Behind Act of 2001 states as follows:

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

The question presented is whether, given that provision, Congress provided clear and unambiguous notice, as required by this Court's Spending Clause jurisprudence, that the acceptance of funds under the Act by States and school districts is conditioned upon an obligation that they spend their own funds and incur costs to comply with requirements of the Act even if the Federal funding provided under the Act falls far short of paying for the costs of satisfying those requirements.

PARTIES TO THE PROCEEDING

In addition to the Petitioners, which are listed on the cover, the Laredo Independent School District was a plaintiff/appellant in the proceedings below.

The Respondent is the Secretary of the United States Department of Education.

CORPORATE DISCLOSURE STATEMENT

The National Education Association, the Connecticut Education Association, the Illinois Education Association, the Michigan Education Association, the Ohio Education Association, the Utah Education Association, the Indiana State Teachers Association, the Texas State Teachers Association, NEA-New Hampshire, the Vermont NEA, and the Reading Education Association are organized as nonprofit corporations. None has a parent corporation, nor does any publicly held company own any stock in any one of these non-profit corporations.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan is unpublished and is reproduced at Pet. App. 1a-9a. The opinion of the three-judge panel of the Sixth Circuit, which the Sixth Circuit subsequently vacated upon granting the Secretary's petition for rehearing, is published at 512 F.3d 253, and reproduced at Pet. App. 10a-74a. The *en banc* Sixth Circuit's order affirming the District Court's judgment of dismissal by an equally divided vote, and the opinions accompanying that order, are published at 584 F.3d 253, and reproduced at Pet. App. 78a-79a, 80a-201a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit, sitting *en banc*, entered judgment on October 16, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 1 of the United States Constitution, known as the Spending Clause, provides in relevant part as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."

Section 9527 of the No Child Left Behind Act, Pub. L. 107-110, 115 Stat. 1425 (2002) ("NCLB"), codified at 20 U.S.C. § 7907, states as follows:

PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.

(a) GENERAL PROHIBITION.—Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

(b) PROHIBITION ON ENDORSEMENT OF CURRICULUM.--Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.

(c) PROHIBITION ON REQUIRING FEDERAL APPROVAL OR CERTIFICATION OF STANDARDS.—

(1) IN GENERAL.—Notwithstanding any other provision of Federal law, no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to affect requirements under title I or part A of title VI.

(d) RULE OF CONSTRUCTION ON BUILDING STANDARDS.—

Nothing in this Act shall be construed to mandate national school building standards for a State, local educational agency, or school.

INTRODUCTION

This case involves a question of exceptional national importance warranting review by this Court: whether, notwithstanding the prohibition in NCLB Section 9527(a) against requiring States or school districts "to spend any funds or incur any costs not paid for under this Act," the Secretary may require that States and school districts spend their own funds to pay for the substantial costs of complying with the NCLB's numerous and costly requirements, where the federal funds provided under the NCLB fall far short of covering the costs of those requirements.

Because Congress enacted the NCLB pursuant to the Spending Clause of the United States Constitution, analysis of this question is governed by the "clear notice" rule governing the interpretation of Spending Clause legislation, developed in a line of cases beginning with *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and reiterated and applied most recently in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Under this rule, Congress must "set out unambiguously" any condition that it attaches to the receipt of federal funds, so that those conditions can be accepted "voluntarily and knowingly." *Arlington*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17.)

The Secretary has taken the position that, notwithstanding Section 9527(a), States and school districts must comply with each and every one of the NCLB's many costly requirements, regardless of whether the Federal Government has provided sufficient funding to pay for the extra costs that compliance entails, and no matter how far short the Federal funding may have fallen. Thus, on the Secretary's view, States and school districts, by accepting federal funds, can be required to bear anywhere from zero to one hundred percent of those federally mandated compliance costs.

Resolution of the question whether the Secretary's position is permissible is of enormous consequence to States and school districts, which, as a result of the Secretary's position and of the Federal Government's failure to provide sufficient funds, have been forced to divert their own funds to pay for substantial costs that would not exist but for the Federal requirements set forth in the NCLB, at the expense of the educational programs to which these State and local funds would otherwise be directed.

In this case, the District Court accepted the Secretary's interpretation as a matter of law and, on that basis, dismissed the case on the pleadings. After the Sixth Circuit reversed in a divided panel decision, the court vacated that decision and then affirmed the District Court's decision by an evenly divided vote of the *en banc* court.

Review is warranted because of the importance of the issue and because both the District Court and the members of the Court of Appeals who agreed with the District Court's decision on the merits reached their conclusions by evading the clear notice rule in a

manner that is contrary to this Court's decision in *Arlington*.

STATEMENT OF THE CASE

I. THE NO CHILD LEFT BEHIND ACT

The No Child Left Behind Act is the latest iteration of the Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 2701 *et seq.*), which, as reauthorized and amended from time to time, has been the principal statutory scheme governing Federal primary and secondary education spending for more than four decades. With the enactment of the NCLB in 2002, Congress made far-reaching amendments to the ESEA scheme, greatly expanding Federal involvement in education and affecting all the nation's public schools.

The NCLB sets as its overall goal that all children in the nation's public schools be "proficient" in reading and mathematics by the year 2014.[1] The NCLB seeks to achieve that ambitious goal through the creation of unprecedented Federal requirements relating to instructional content and academic achievement standards, annual tests aligned to those standards, teacher and paraprofessional qualifications, data-collection and reporting, assessments of school and school district performance, and corrective actions to be taken when schools' perfor-

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[1] This goal is expressed in the "Timeline" section of the Act, which states that "[e]ach State shall establish a timeline for adequate yearly progress" and that "[t]he timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group . . . will meet or exceed the State's proficient level of academic achievement on the State assessments . . . ." 20 U.S.C. § 6311(b)(2)(F).

mance falls short of benchmarks designed to ensure one hundred per cent proficiency by 2014.

Title I, Part A of the NCLB imposes the following requirements on States and school districts:

- *Curriculum and Achievement Standards Requirements*: The NCLB requires States to develop and implement "challenging" standards for "academic content" as well as "challenging student achievement standards" that are aligned with those content standards. 20 U.S.C. § 6311(b)(1)(A), (D).

- *Testing Requirements*: States must develop, and school districts must implement, a statewide testing regime, which must include math and reading tests administered annually to students in grades 3-8 and once more while students are in grades 10-12. And, as of the 2007-2008 school year, school districts also must administer science tests for students in grade ranges 3-5, 6-9, and 10-12. *Id.* § 6311(b)(3)(C). In all, the law requires the administration of no less than seventeen different annual standardized tests, which must meet a host of statutory criteria. *Id.* § 6311(b)(3)(C)(i)-(xv).

- *Data-Gathering, Grading, and Reporting Requirements*: Based primarily on student performance on NCLB-mandated tests, States and school districts must annually grade and publicly report on the performance of all schools, designating them as making or failing to make "Adequate Yearly Progress" ("AYP"). These evaluations must show aggregate results as well as results broken down

into statutorily prescribed subgroups. *Id.* §§ 6311(b)(2), 6311(h)(1)-(2), 6316(a)(1)(A)-(B).

- *School Improvement Requirements*: If a school does not achieve AYP within prescribed timelines, States and school districts must take actions against the schools and school districts that fall short. States and school districts are not free to take whatever actions they deem appropriate, but must instead pick from a menu of options specified by the statute, which range from permitting all students to transfer from such schools to replacing the staff, reopening the school as a charter school, or contracting the operation of the school to a private company. *Id.* § 6316(b)(7).[2]

In the NCLB, Congress authorized the appropriation of unprecedented amounts of Federal funds to enable states and school districts to comply with these extensive requirements. The Act specifies that Congress is authorized to appropriate grants to school districts to carry out the NCLB Title I mandates totaling $13.5 billion in fiscal year ("FY") 2002, $16 billion in FY 2003, $18.5 billion in FY 2004, $20.5 billion in FY 2005, $22.75 billion in FY 2006 and $25 billion in FY 2007. *See* 20 U.S.C. § 6302(a). These unprecedented authorization levels reflect Congress's understanding that "significant and annual increases in Title I authorizations" would be required to provide states and school districts with the Federal resources needed "to implement fully the

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[2] Other titles of the NCLB prescribe further requirements, such as the requirement in Title II, Part A that teachers and paraprofessionals meet statutorily prescribed qualification requirements. *Id.* § 7801(23)(A); *id.* § 6319(d).

reforms incorporated in the [NCLB]." H.R. Conf. Rep. No. 107-334, at 693 (2001).

However, the actual appropriations under the NCLB have been far below the authorized levels. By way of illustration, the complaint documents that Congress appropriated $30.8 billion dollars less for Title I grants to school districts from fiscal year 2002 to fiscal year 2006 than it had authorized for those purposes in the NCLB. Pet. App. 19a. And the complaint alleges that the Federal funds provided to the States and school districts have been far below the levels that would be needed to pay for the costs of complying with the NCLB's extensive requirements.

The NCLB carries forward the ESEA's long-standing maintenance-of-effort and supplement-not-supplant provisions, which are designed to prevent States and school districts from using Federal funds to pay for programs that the States and school districts would pay for in the absence of those Federal funds. 20 U.S.C. § 6321. The maintenance-of-effort provision requires that a school district must, in order to receive Federal funds in a given year, maintain its financial support at a level that is at least ninety percent of amount of its financial support from the previous year. *Id.* §§ 6321(a), 7901(a). The supplement-not-supplant provision requires that States and school districts use their federal funds only "to supplement the funds that would, in the absence of such federal funds, be made available from non-federal sources for the education of pupils participating in programs assisted under [the NCLB], and not to supplant such funds." *Id.* § 6321(b).

At the same time, Congress also included in the NCLB Section 9527(a)—the only provision in the Act that speaks directly to the obligation *vel non* of States

and school districts to use non-Federal funds to pay for NCLB compliance. That provision, set forth within the "General Provisions" of Title IX of NCLB, states, in full, as follows:

> PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.
>
> (a) GENERAL PROHIBITION.—Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

II. PROCEEDINGS AND DISPOSITION BELOW

Petitioners filed suit against the Secretary on April 20, 2005, alleging that the Secretary was violating the Spending Clause and the terms of Section 9527(a) "by changing one of the conditions pursuant to which states and school districts accepted federal funds under the NCLB—*viz.*, that states and school districts would not be required to spend any funds or incur any costs not paid for under this Act." Pet. App. 4a. Plaintiffs' complaint sets forth detailed allegations that Congress has not provided States and school districts with Federal funds that are remotely sufficient to pay for full compliance with the Act.

Despite this shortfall in Federal funding—and despite assurances in the early years of the program by then-Secretary Roderick Paige that the NCLB "contains language that says that things that are not

funded are not required" and that "if it's not funded it's not required," Pet. App. 161a—the Secretary has insisted that States and school districts must comply with each and every one of the NCLB's requirements, Pet. App. 23a, 161a. The Secretary's insistence that school districts comply with all NCLB requirements has forced the plaintiff school districts to divert funds from existing programs to comply with NCLB requirements. Pet. App. 23a, 93a.

The Secretary moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), arguing that none of the plaintiffs had standing to bring the lawsuit and that, in any event, NCLB Section 9527(a) did not support plaintiffs' claim. Pet. App. 5a. The District Court held that the plaintiffs had adequately alleged a basis for standing but agreed with the Secretary's position on the merits and dismissed the complaint under Rule 12(b)(6). Pet. App. 6a-9a. In so doing, the District Court adopted the Secretary's argument that Section 9527(a) "clearly" means only that Federal officers and employees are prohibited "from imposing additional, unfunded requirements, beyond those provided for in the statute," and "cannot reasonably be interpreted to prohibit Congress itself from offering federal funds on the condition that States and school districts comply with [the NCLB's] many statutory requirements." Pet. App. 9a.

Plaintiffs appealed. Plaintiffs were supported by *amici curiae* urging reversal, including seven States (Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, and Wisconsin) and the District of Columbia. The brief filed by those jurisdictions made clear that when each of them "opted to participate in the NCLB programs [they] understood, based on the plain language and statutory context of [Section

9527(a)], that neither states nor local school districts would be required to spend their own funds to comply with the NCLB mandates." *Amici Curiae* Brief of the States of Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin, and the District of Columbia, in *School District of the City of Pontiac, et al. v. Secretary of U.S. Department of Education*, 6th Cir. No. 05-2708, at 2.

A divided panel of the Sixth Circuit reversed the District Court. App. 10a-74a. The majority concluded (1) that the school district plaintiffs had standing to raise the claims in the lawsuit; and (2) that in light of Section 9527(a), the NCLB did not provide clear notice, as required by this Court's Spending Clause jurisprudence, that acceptance of NCLB funds by States and school districts is conditioned on their agreement to spend their own funds to comply with NCLB requirements in the event that Federal funds are insufficient. Pet. App. 10a-50a. The dissent argued that Section 9527(a) operates only to make clear that the NCLB is a voluntary program under which States are entitled to opt out if they believe that the burdens of participation outweigh the benefits. Pet. App. 51a-74a.

The Sixth Circuit granted the Secretary's petition for rehearing *en banc*, thereby vacating the panel decision and reinstating the case as an active appeal from the District Court's judgment dismissing the case. Pet. App. 75a. The parties submitted supplemental briefs and the *en banc* Sixth Circuit heard oral argument on December 10, 2008. After the argument, the Court of Appeals ordered further briefing on a number of issues that had not previously been raised or briefed, including whether plaintiffs' claims were ripe and whether the claims could

properly be resolved without the participation of the States in which the school district plaintiffs are located. Pet. App. 76a-77a.

On October 16, 2009, the Sixth Circuit issued an order affirming the District Court's dismissal by an evenly divided vote of the sixteen judges in active service. Pet. App. 78a-79a. In connection with that order, the court issued four separate opinions.

Thirteen of the sixteen judges concluded that the issue of whether States and school districts could be required to spend their own funds to comply with the NCLB was properly before the court.[3] But no position on the merits of the issue commanded a majority.

Thirteen judges stated conclusions on the merits. Seven agreed with plaintiffs that, in light of Section 9527(a), "a state official would not clearly understand

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[3] Those judges concluded that the school district plaintiffs had standing to sue, that the case was ripe, and that dismissal under Fed. R. Civ. P. 19 was not warranted by reason of the non-joinder of Michigan, Vermont, and Texas as parties. *See* Pet. App. 90a-106a (opinion of Cole, J., joined by Martin, Daughtrey, Moore, Clay, Gilman, and White, JJ., and joined in pertinent part by Gibbons, J.); 127a-137a (opinion of Sutton, J., joined by Batchelder, C.J., and Boggs, Cook, and Kethledge, J.J.). Three judges concluded that the case was not ripe and, alternatively, should be dismissed under Rule 19 by reason of the non-joinder of Michigan, Texas, and Vermont as parties. Pet. App. 165a-195a (Opinion of McKeague, J., joined in pertinent part by Rogers and Griffin, J.J.). The Rule 19 issue was raised for the first time in Judge McKeague's opinion, and was never briefed by the parties. *See* Pet. App. 131a. Hence, the substantial discussion of the grounds for rejecting the notion that the case should be dismissed under Rule 19 that appear in the opinions of Judge Cole and Judge Sutton were responses to Judge McKeague's having introduced the issue for the first time in his *en banc* opinion.

that accepting federal NCLB funds meant agreeing to use state and local funds to meet [NCLB-required] goals rendered otherwise unreachable by deficient federal funding." Pet. App. 113a (opinion of Cole, J., joined by Martin, Daughtrey, Moore, Clay, Gilman, and White, JJ.). Six judges, however, agreed with the Secretary's view that the NCLB "clearly requires the States (and school districts) to comply with its requirements, whether doing so requires the expenditure of state and local funds or not." Pet. App. 141a (opinion of Sutton, J., joined by Batchelder, C.J., and Boggs, Cook, and Kethledge, J.J., and joined in pertinent part by McKeague, J.).[4]

Judge Cole, writing for the seven-judge plurality, reached the conclusion that the "clear notice" rule does not permit the Secretary to require States or school districts to spend their own funds on NCLB compliance. Noting this Court's admonition that, ""'in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly,'" Pet. App. 112a (quoting *Pennhurst*, 451 U.S. at 17-18), Judge Cole concluded that "[h]ere, no such provision exists. NCLB simply does not include any specific, unambiguous mandate requiring the expenditure of non-NCLB funds." Pet. App. 113a. "To the contrary," Judge Cole continued, "[b]ased on [Section 9527(a)], a state official likely would reach the opposite conclusion—namely, that her State would not be forced to provide funding for NCLB

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[4] Judge Gibbons filed a separate opinion in favor of reversal, concluding that the plaintiffs stated a claim sufficient to withstand a motion to dismiss under Rule 12(b)(6), but that a definitive answer to the merits question should await further development of the record on remand. Pet. App. 196a-201a.

requirements for which federal funding falls short." *Id.*

Judge Cole then carefully considered the two alternative interpretations urged by the Secretary—*i.e.*, (1) that Section 9527 (a) "merely prevents officers and employees of the federal government from imposing additional, unauthorized requirements on the participating States"; and (2) that Section 9527(a) "simply emphasizes that state participation in the NCLB is entirely voluntary"—but found neither to be a "self-evident" reading of the provision such as would dispel any ambiguity in Section 9527(a) or render plaintiffs' reading of the provision implausible. Pet. App. 116a, 117a-123a.

Judge Cole noted that the interpretations proffered by the plaintiffs and the Secretary were each in some ways "plausible" and in some ways "flawed;" but he emphasized that the "relevant inquiry" is "not [to] decide which of the . . . interpretations is correct," but rather "'whether . . . a state official would clearly understand . . . the obligations'." Pet App. 124a (quoting *Arlington*, 548 U.S. at 296). Given the conclusion that Section 9527(a) can plausibly be construed as requiring compliance with all of the NCLB's requirements only to the extent that they are paid for by Federal funds, Judge Cole concluded, "the answer must, therefore, be 'No.'" *Id.*

In reaching the contrary conclusion, Judge Sutton's opinion adopted an entirely different mode of analysis. Rather than beginning with the text of the statutory provision at issue, Judge Sutton took as a starting point his characterization of the purpose of the NCLB. Pet. App. 141a-151a. Relying on an admittedly "broad brush strokes" description of "the basic bargain underlying the Act"—*viz.*, that the

Federal Government provides "substantial funds" plus "substantial flexibility" in exchange for "accountability" for results on the part of States and school districts—Judge Sutton posited that the overriding purpose of the entire Act is "accountability." Pet. App. 141a-142a. From that premise, Judge Sutton reasoned that allowing States and school districts to pare back their compliance efforts based on inadequate funding would "break the accountability backbone of the Act," making "it hard if not impossible to hold them accountable for meeting the Act's goals." Pet. App. 144a.

After devoting the bulk of analysis to these general-purpose-based reasons why Section 9527(a) cannot plausibly mean what plaintiffs interpreted it to mean, Judge Sutton's opinion briefly addressed what the provision *does* mean. At the close of the discussion, Judge Sutton's opinion posited that the provision merely plays the "modest role" of confirming that, by enacting the NCLB, the Federal Government is not telling the States and school districts how to develop their own local educational programs with their own funds:

> The section merely re-enforces the flexibility that the Act gives to school districts in developing their *own* local programs and spending their *own* funds in tackling local education matters. It functions as an anti-commandeering rule of construction, nothing more. [Pet. App. 156a (emphasis in original).]

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE WITH MAJOR FINANCIAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS

This case involves a question of exceptional national importance warranting review by this Court: whether, notwithstanding NCLB Section 9527(a), the Secretary may require that States and school districts spend their own funds to pay for the substantial costs of complying with the NCLB's numerous and costly requirements, even if the Federal funds provided under the NCLB are grossly insufficient to pay for compliance with those requirements.

The resolution of this question is of enormous consequence to States and school districts. Because the funds the Federal Government has provided to States and school districts do not come close to covering the costs of complying with the NCLB's requirements, the Secretary's insistence that States and school districts must nevertheless comply with each and every requirement of the Act means that States and school districts must divert their own funds to pay for substantial costs that would not exist but for the Federal requirements set forth in the NCLB, in amounts that depend on the vagaries of NCLB appropriations from year to year.

The hardships this places on States and school districts, requiring them to cut back on other educational programs in order to toe the line of NCLB compliance, have only become more severe since the filing of this lawsuit in 2005, both because the costs

of compliance, by statutory design, have increased[5] and because States and school districts throughout the nation are confronting a fiscal crisis of the first magnitude. Review of this question is thus particularly appropriate at this time and in this case.

In this connection, the fractured nature of the Sixth Circuit's decision further argues in favor of review. Due to the equal division of the *en banc* court, the District Court's decision stands affirmed, although none of the sixteen members of the *en banc* court endorsed the reasoning of that opinion. Petitioners' submission on the merits was accepted by more members of the Sixth Circuit than rejected it, but the court ended up evenly divided on whether to affirm the District Court's dismissal of the case, due to the fact that three judges, expressing a view rejected by the other thirteen, declared that the case was not justiciable. The result is to leave it completely uncertain whether, under this nation's principal statute governing public education, States and school districts can be required to spend enormous and unpredictable amounts of their own resources to comply with requirements that the Federal Government has dictated but has failed to

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[5] Many of the NCLB mandates are backloaded and take full effect only in the out years of the program. For example, when the NCLB was first enacted, school districts were required to annually administer six standardized tests—math and reading/language arts tests to students in each of three different grade ranges (3-5, 6-9, and 10-12). 20 U.S.C. § 6311(b)(3)(C). But the NCLB now requires school districts to annually administer seventeen standardized tests—math and reading/language arts tests to students in every grade from 3-8 and, once more, to students while they are in grade range 10-12, as well as testing in science for students in each of three different grade ranges (3-5, 6-9, and 10-12). *Id.*

fund.[6] Given this Court's recognition of the importance that States and local governments be clearly informed of the obligations they will be assuming if they participate in a program enacted pursuant to the Spending Clause, this Court should grant review to settle this matter.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S SPENDING CLAUSE JURISPRUDENCE BY EVADING THE GOVERNING CLEAR NOTICE RULE

Review also is warranted because the *en banc* Sixth Circuit's affirmance, essentially by default, of the District Court's dismissal of Petitioners' claim leaves in place a decision that is contrary to this Court's Spending Clause jurisprudence, and Judge Sutton's opinion for the six members of the *en banc* Court who agreed with the District Court on the merits adopted a mode of analysis that amounts to an evasion of the clear notice rule.

A. In *Arlington*, this Court refused to construe the word "costs" in a fee-shifting provision within the

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[6] The question presented here has been raised in one other pending case, *Connecticut v. Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008), which is currently before the Second Circuit. But that case arises in a very different posture—Connecticut's effort to secure judicial review of the Secretary's denial of Connecticut's proposed amendments to its NCLB State Plan—and the District Court dismissed Connecticut's Section 9527(a)-based Spending Clause claim on the ground that it had not been presented to the Secretary in the administrative proceedings sought to be reviewed. *See id.* at 177-78. It is thus unlikely that any judicial decision on the merits of the question will issue in the near future.

Individuals with Disabilities Education Act ("IDEA") to require a school district to reimburse parents for the expert fees they incurred in bringing a successful IDEA action against the district. In rejecting the Secretary's attempt to impose that obligation on school districts, the Court made clear that, in applying the clear notice rule in a Spending Clause case, "we begin with the text." 548 U.S. at 296. Reasoning that the word "costs" is not generally understood to include "expert fees," the Court found that nothing in the fee-shifting provision or the other provisions of the IDEA "provide[s] [States and school districts with] the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." *Id.* at 300.

Of signal importance here, the Court reached that result in *Arlington* even though the reimbursement of expert fees found support in the IDEA's "overarching goal of 'ensur[ing] that all children with disabilities [are provided] a free appropriate public education' . . . as well as the goal of 'safeguard[ing] the rights of parents to challenge school decisions that adversely affect their child.'" *Id.* at 303 (citations omitted). This Court explained that such general goals do not provide the constitutionally mandated clear notice:

> These goals . . . are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations. Because the IDEA is not intended in all instances to further the broad goals identified by respondents at the expense of fiscal considerations, the goals cited by respondents do little to

bolster their argument on the narrow question presented here. [*Id.*]

B. Starting, as *Arlington* mandates, with the text of the relevant provision, the most natural reading of the language that Congress used in NCLB Section 9527(a) supports Petitioners.

1. Section 9527 is part of the "Uniform Provisions" subsection of the "General Provisions" of the NCLB, which sets out rules that apply across the board to the interpretation and implementation of the statute. By its placement and its terms, Section 9527(a) therefore speaks to how the NCLB, as a whole, is to be construed. In that regard, Section 9527(a) establishes two separate limitations on NCLB implementation that are designed to protect the prerogatives of States and school districts. One limitation—set forth in the first clause of the provision—states that "[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control, a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources." The other limitation, at issue here, is set forth in the final clause: "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."

That second clause, on its face, provides that the Act shall not be interpreted in such a way as to require States or school districts "to spend any funds or incur any costs not paid for under this Act." The District Court, however, declared that the language prohibits "unfunded requirements" only if they go "beyond those [requirements] provided for in the statute." Pet. App. 9a. That reading has nothing to

commend it. Presumably a requirement not "provided for in the statute" cannot be mandated whether it is funded or not, so, on the District's Court's reading, Section 9527(a) becomes mere surplusage. But even more to the point, Section 9527(a) provides without qualification that States and school districts cannot be required "to spend any funds or incur any costs not paid for under this Act," *period.* The District Court's conclusion that States and school districts *can* be forced to spend funds and incur costs on compliance requirements not paid for under the Act, as long as the requirements on which the State or school district is forced to spend its own funds are among the many requirements (*e.g.*, testing, data-collection, reporting and school-intervention requirements) "provided for" in the Act, is a highly strained reading of Section 9527(a), under which the statute falls far short of providing the clear notice that the Spending Clause requires.

2. Although seven of the members of the *en banc* court rejected both the analysis and the conclusion reached by the District Court, *see supra* at 12-13, the opinion written by Judge Sutton for six members of the court agreed with the District Court that Section 9527(a) does not prohibit requiring States and school districts to spend their own funds to comply with NCLB requirements. But the clear meaning Judge Sutton claimed to find in Section 9527(a) was not the same as the clear meaning the District Court thought it had found: according to Judge Sutton, Section 9527(a) "merely re-enforces the flexibility that the Act gives to school districts in developing their *own* local programs and spending their *own* funds in tackling local education matters." Pet. App. 156a.

That construction is just as untenable as the District Court's construction. Ensuring that school districts remain free to "develop[] their *own* local programs and spend[] their *own* funds in tackling local education matters" as they see fit is the office of the *first* part of Section 9527(a), which prohibits "mandat[ing], direct[ing], or control[ling] a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources." Hence, the construction proffered by Judge Sutton's opinion merely takes a somewhat different route than the District Court to arrive at the same result of reducing to surplusage the *second* part of Section 9527(a), which prohibits "mandat[ing] a State or any subdivision thereof to spend any funds or incur any costs not paid for under [the NCLB]."[7]

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[7] Judge Sutton also contended that because the language relied upon by Petitioners is "a single half-sentence 559 pages into the Act," Petitioners' understanding of Section 9527(a) would make it a stealth provision—an "'elephant[]'" hidden within the "'mousehole[]'" of an "'ancillary provision[].'" Pet. App. 159a-160a (quoting *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001)). As an initial matter, the meaning and import of an enactment does not hinge on its length or on which page it appears (otherwise the equal protection clause of the Fourteenth Amendment could be written off as a mere half-sentence in a document appended to the end of the Constitution). Besides, the placement of Section 9527(a) within the statute, far from concealing its import, makes its significance clear. Section 9527(a) is located among the "Uniform Provisions" set forth in Part E of NCLB Title IX's "General Provisions." Those provisions apply, across the board, to the entirety of the NCLB and include such fundamental matters as prohibitions against discrimination. *See* 20 U.S.C. §§ 7913, 7914. Furthermore, the relevant legislative history demonstrates that Congress was well aware of the significance of the "single half-sentence" that it enacted in NCLB Section 9527(a). That language appeared in three education statutes passed in

B. But Judge Sutton's discovery of "clear notice" in the NCLB was not in any event based principally on a construction of Section 9527(a) or of any other specific statutory text. Contrary to this Court's admonition in *Arlington* that the starting point and principal focus of the "clear notice" inquiry must be the statutory language, Judge Sutton does not even mention Section 9527(a) until late in his opinion, after first discussing at length his conception of "[t]he basic bargain underlying the Act," Pet. App. 141a, and the policy "centerpiece of the Act," Pet. App. 142a, which, in his view, should trump Petitioners' reading of Section 9527(a).

In its deployment of that analysis, Judge Sutton's opinion displays a technique by which courts may readily evade the clear notice requirement of this Court's Spending Clause jurisprudence—a technique the Court disapproved in *Arlington*. For the key to Judge Sutton's approach is the use of overbroad and unduly simplistic conceptions of the statutory *purpose* as a means of finding "clear notice" where statutory *language* points the other way.

1994 (the Goals 2000 Educate America Act, Pub. L. 103–227; the School to Work Opportunities Act, Pub. L. 103–229; and the Improving America Schools Act, Pub. L. 103–382), and was carried over into the NCLB. *See* Pet. App. 43a-47a (panel majority's discussion of the legislative history). During the 1993-94 legislative debates concerning an amendment that introduced the text that became that "single half-sentence" in the NCLB, the Members of Congress who spoke on the amendment uniformly made clear that the language was designed to prevent the Federal Government from imposing requirements on States and localities for which the federal government did not pay. *See* Pet. App. 45a (panel majority's discussion of the debates).

1. Judge Sutton's opinion begins by describing "[t]he basic bargain underlying the Act" as one in which States and school districts are "allocate[d] substantial federal funds" and given "substantial flexibility in deciding how and where to spend the money," for which the States and school districts "in return...must achieve progress in meeting certain educational 'outputs' as measured by the Act's testing benchmarks." Pet. App. 141a-142a. However, that formulation fails to acknowledge that a State that chooses to participate in the NCLB program has no way of knowing how "substantial" the Federal funds will prove to be. There is nothing in the statute that would prevent the Federal Government from providing a level of funding that is not remotely sufficient to enable the States to comply with the Act's requirements—which, as Petitioners' complaint alleges, is in fact what has happened; and Judge Sutton's position is that the States and school districts nevertheless are obligated to spend their own funds no matter how inadequate the Federal funding has proved to be.

There is no basis in the statutory language or structure for the notion that such an arrangement constitutes "the hallmark bargain at the core of this legislation," Pet. App. 159a. On the contrary, the "bargain" Judge Sutton posits would be an illusory one, because one side of the bargain—the amount of Federal funding that will be provided—is both indeterminate and unenforceable.

Equally misplaced are Judge Sutton's assertions that "accountability"—variously described in his opinion as "the centerpiece," "the essential objective," "the . . . backbone," and "the heartland" of the Act, Pet. App. 142a, 144a, 151a—is the single, overriding goal of the NCLB, and that Petitioners' understand-

ing of Section 9527(a) is "implausible" because it allegedly would undermine that goal.

Purporting to identify a single, overriding goal in a complex statutory scheme such as the NCLB—which occupies 670 pages in the United States Statutes at Large—is a dubious and perilous endeavor. It is in the nature of major legislation such as the NCLB that it will embody multiple purposes and that its provisions will reflect a number of political compromises pointing in different directions. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.").

Here, to whatever extent "accountability" may be the "centerpiece" of the Act, it is error to assume that this means that Congress intended to impose "accountability," in the form of the Act's extensive requirements, *at whatever cost* to States and school districts. As this Court has explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original.)

It is precisely for these reasons that this Court in *Arlington* concluded that the "goals" of the IDEA were "too broad" to create "clear notice" of a condition placed on the acceptance of funds that was not apparent on the face of the statute itself, because the "goals" of the statute were tempered by "other considerations, *including fiscal considerations.*" 548 U.S. at 303 (emphasis added). That conclusion applies with even greater force here, given the specification in the NCLB that States and school districts are not to be required to pay for "costs not paid for under the Act."

To paraphrase this Court's discussion in *Arlington:*

> [The NCLB] obviously does not seek to promote [accountability] at the expense of all other considerations, including fiscal considerations. Because [the NCLB] is not intended in all instances to further [its] broad goals . . . at the expense of fiscal considerations, [those] goals . . . do little to bolster [the Secretary's] argument on the narrow question presented here. [548 U.S. at 303.]

2. The ease with which a "purpose"-based analysis such as Judge Sutton applied in his opinion can be used to nullify the clear notice rule is demonstrated by that opinion's exaggerated account of how Petitioners' understanding of Section 9527(a) would affect the posited "centerpiece" of "accountability," and by the opinion's failure to consider how the *Secretary's* approach would come "at the expense of fiscal considerations," *Arlington*, 548 U.S. at 303, which are equally a part of the legislative compromise.

a. Judge Sutton's opinion declares that, if Section 9527(a) is read as Petitioners have read it, States and school districts could avoid complying with NCLB

requirements whenever they unilaterally decided that Federal funding was insufficient. *See* Pet. App. 144a-145a. That is not what Petitioners contend; by its terms, Section 9527(a) applies to requirements that *in fact* are "not paid for" by Federal funding.[8]

Nor is Judge Sutton correct in his alternative contention that Petitioners' interpretation is unworkable because the flexibility that States and school districts retain in the particulars of their compliance undertakings makes it "impossible to calculate or even define the costs of complying with the Act's requirements." Pet. App. 148a. Under the NCLB, States and school districts unquestionably are incurring substantial costs that, in the absence of the statute, they would not be incurring due to their own programmatic choices. For example, prior to the enactment of the NCLB, no school district in the country was administering reading/language arts and mathematics tests to its entire student populations in grades 3 through 8 and in high school; grading schools based on the participation and performance of students on such tests both in the aggregate and

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[8] Under the NCLB scheme, a claim that a particular NCLB requirement should not be imposed on a State or school district because of a lack of Federal funding could arise in one of two ways, each of which would call upon *the Secretary* to make an administrative determination as to the merit of the claim. First, a State could request that the Secretary approve an amendment to the State's accountability plan to excuse compliance with the requirement. *See* 20 U.S.C. § 6311(f). Second, a State or school district electing to act unilaterally by ceasing to comply with a requirement of NCLB would face the prospect of the Secretary's taking enforcement action by instituting administrative proceedings. *See* 20 U.S.C. 1234c(a). In neither case would the mere assertion by a State or school district that federal funding is inadequate suffice.

by disaggregated NCLB subgroups; and taking the actions required by the NCLB against schools that did not achieve adequate test results for each student subgroup. The costs of such measures are plainly susceptible to calculation.

To be sure, in some instances there may be room to dispute whether a cost that a State or school district attributes to the NCLB is in reality a cost that would have been incurred even in the absence of the statute. But that is neither a new problem nor an insuperable one: under the longstanding supplement-not-supplant provisions of the ESEA, the Secretary has long made determinations as to what States and school districts would be spending on their programmatic activities in the absence of Federal funds. *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) (upholding Secretary's order requiring a state to return federal funds that were used to supplant state expenditures).

b. At the same time, Judge Sutton's opinion gives no account to the harm that would befall States and school districts under the Secretary's interpretation, pursuant to which States and school districts would be required to bear anywhere from zero to one hundred percent of the substantial costs of fully complying with all of the requirements imposed on them by the NCLB, depending on the extent to which the Federal Government chooses to fund the NCLB from year to year. The direct consequence, when Federal funding is insufficient—as it has been to an extreme degree—is that States and school districts are forced to divert funds from their existing educational programs and priorities and press those scarce resources into service in meeting Federal requirements.

Given the "well established" principle "that education is a traditional concern of the States," *United States v. Lopez*, 514 U.S. 549, 580 (1995), the clear notice rule should apply with particular force where, as here, the putative condition on Federal funding would result in "the surrender of one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment—the education of our children." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997) (*en banc*). Yet Judge Sutton's opinion, in exalting the interest in "accountability," sets at naught Congress's interest in avoiding the imposition on States and school districts of unfunded obligations that would leave those governments unable to devote their own resources to local educational priorities.

If the clear notice rule means anything, it means that a court cannot hold that a Spending Clause statute imposes massive obligations on States and local governments that run counter to a provision in the statute which, on its most natural reading, prohibits the imposition of those obligations, merely because the court deems the imposition of those obligations essential to a single "purpose" that the court has chosen to select from among the numerous different objectives and concerns that shaped the legislation.

C. Considered according to its terms and in context, Section 9527(a) reflects the answer to a fundamental policy question: if Federal funds fall short of what is required for full compliance with the NCLB's requirements, did Congress intend for States and school districts to fill the gap by diverting funds from their own educational programs and priorities, or did Congress intend for the NCLB's compliance

obligations to be tempered so as to avoid that result? This question reflects a judgment as to which sovereign's interests should give way in the event that Federal funding for the NCLB's ambitious goals falls short of what is necessary for States and school districts to implement fully its requirements. Congress's answer—as reflected in the plain language of Section 9527(a)—is that States and school districts should *not* be obligated to divert their own funds to meet all of the Federal Government's NCLB educational priorities. Given the substantial State and local interests at stake, it certainly cannot be said that this answer is so outlandish as to call for straining to read the language of Section 9527(a) out of the statute or abrogating the clear notice rule by means of tenuous inferences drawn from an exaggerated focus on only one of the multiple objectives Congress balanced in enacting the NCLB.

* * * *

If the decision below is allowed to stand, States and school districts will be required to divert substantial amounts of their limited resources from educational programs of their own choice to programs mandated by the Federal Government, in which (as the *amici* States explained, *see supra* at 10-11), the States and school districts agreed to participate on the understanding that, by virtue of Section 9527(a), they would *not* have to spend their own resources if sufficient Federal funding was not provided for these Federal initiatives. The District Court decision which the equally divided Court of Appeals has affirmed pulls the rug out from under the States and local governments through a construction of Section 9527(a) that is far from the most natural reading of the provision—indeed, the District Court's construction

effectively rewrites the provision. In turn, the six judges of the Court of Appeals who agreed with that result employed an approach that refuses to give Section 9527(a) its due simply because the provision, if given its natural meaning, would create a tension with one statutory objective which those judges deemed to be the sole touchstone for construing the NCLB, ignoring other objectives that are equally part of the congressional compromises that forged this major legislation.

The result is to subject States and school districts to enormous financial obligations of which they had no clear notice when they elected to participate in the NCLB. Because of the significance of that outcome, and because the decisions below fail to adhere to this Court's clear notice rule for Spending Clause legislation—and, in particular, are in conflict with *Arlington*—the case warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 14, 2010

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 11/23/2005]

Civil Action No. 05-CV-71535-DT

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Plaintiffs,

vs.

MARGARET SPELLINGS,
Defendant.

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS

This matter is presently before the court on defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) or (b)(6). Plaintiffs have responded, defendant has replied, and the court has heard oral argument. For the reasons stated below, the court shall grant the motion.

The plaintiffs in this case include several school districts in three States (Michigan, Texas, Vermont), the National Education Association ("NEA"), and NEA-affiliates in ten states (Connecticut, Illinois, Indiana, Michigan, New Hampshire, Ohio, Pennsylvania, Texas, Utah and Vermont). The defendant is Margaret Spellings, in her official capacity as

Secretary of the United States Department of Education.

Plaintiffs allege that defendant, by enforcing various provisions of the No Child Left Behind ("NCLB") Act, is imposing unfunded mandates on the States, although unfunded mandates are prohibited by the statute. The case is well summarized in the introductory section of the complaint:

> This is a lawsuit for declaratory and injunctive relief based upon Section 9527(a) of the No Child Left Behind Act ("NCLB"), which provides in full as follows:
>
> (a) General prohibition
>
> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act. [20 U.S.C. § 7907(a)]
>
> Plaintiffs contend that the Secretary of Education is violating this "Unfunded Mandates Provision" by requiring states and school districts to comply fully with all of the NCLB mandates even though states and school districts have not been provided with sufficient federal funds to pay for such compliance. Plaintiffs further contend that by failing to honor the commitment made by the Unfunded Mandates Provision—namely, that the federal government would fund the mandates or not require compliance with them—the Secretary of Education is

violating the Spending Clause of the United States Constitution.

Complaint, pp. 3-4. The complaint summarizes the "NCLB mandates" as follows:

> 32. The NCLB dictates that any state that accepts Title I funding must (a) revise the state's curriculum standards in core academic areas, (b) develop standardized tests aligned with the curriculum standards to measure the progress of public school students in meeting those standards, (c) require school districts to administer those tests to all but a very small group of students, (d) based on the performance of students on those tests, both overall and within specified subgroups (viz., major racial and ethnic groups, low income students, limited English proficiency students and disabled students), require school districts to determine whether schools, and whether the school districts themselves, are making AYP [adequate yearly progress] in improving student performance on those tests, (e) if schools and school districts are not making AYP, take certain specified actions against those schools and school districts, and, finally, (f) ensure that school staff (teachers and paraprofessionals) meet prescribed qualifications requirements. As detailed below, the costs of complying with these NCLB mandates are enormous, and far exceed the limited increase in Title I federal funding that followed enactment of the NCLB.

Several pages of the complaint are devoted to demonstrating the shortfall between the costs of compliance and the federal funds appropriated. For example, regarding "curriculum and testing man-

dates," plaintiffs allege that Illinois will spend $15.4 million per year to develop and administer required tests, whereas the federal government currently gives Illinois $13 million per year for this purpose, a $2.4 million annual shortfall. Regarding "data collection, grading and reporting mandates," the complaint cites Anchorage (Alaska) and Jordan (Utah) as examples of school districts which had to spend more money just to collect, analyze and report data, than they received in total NCLB funds. The complaint also alleges that federal funding for required "technical assistance" is woefully inadequate. Connecticut, for example, received just $218,000 in 2005 to provide such assistance to 93 schools, whereas the actual cost of this mandate was over $18 million.

The complaint asserts two causes of action. The first alleges that defendant is violating the Spending Clause of the U. S. Constitution "by changing one of the conditions pursuant to which states and school districts accepted federal funds under the NCLB—viz., that states and school districts would not be required to spend any funds or incur any costs not paid for under this Act." The second cause of action makes the identical allegation but asserts a claim directly under the "unfunded mandate" section of the NCLB. For relief, plaintiffs request that the court:

> (1) Issue an order declaring that states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB;

> (2) Enjoin defendant and any other officer or employee of ED from withholding from states and school districts any federal funds to which they are entitled under the NCLB because of a failure to comply with the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds to achieve such compliance;
>
> (3) Award to plaintiffs . . . costs, fees and other expenses incurred in prosecuting this lawsuit; and
>
> (4) Order such other and further relief as this Court may deem appropriate.

In her motion to dismiss, defendant first argues that the court lacks subject matter jurisdiction because plaintiffs lack standing. Alternatively, defendant argues that the complaint should be dismissed for failure to state a claim because the section of the NCLB at issue, 20 U.S.C. § 7907(a), does not provide the relief plaintiffs seek.

"Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself." 13 C. Wright & A. Miller, *Federal Practice and Procedure* § 3531, pp. 338-39 (1984). The Supreme Court has devised a three-part test for determining whether a plaintiff has standing:

> It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete

> and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative." These elements are the "irreducible minimum" required by the Constitution.

General Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2301-2302 (1993). *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76 (1982) (plaintiff must allege injury in fact, which means "distinct and palpable injuries that are fairly traceable to [defendants'] actions"). In the present case, defendant argue that plaintiffs have failed to allege or show (1) an "injury in fact," (2) causation, or (3) that the relief sought will redress the injury.

In particular, defendant argues that the NEA and its affiliates lack standing because they are alleging injury to third-parties—namely, States and school districts. The NEA-plaintiffs also allege that they suffer "stigma" and harm to their reputation when the schools they are associated with are found, under the NCLB, to be performing poorly. However, defendant cites solid authority, including *Allen v. Wright*, 468 U.S. 737, 755 (1984), for the proposition that stigma alone generally is not sufficient to confer standing. In response, the NEA-plaintiffs argue that they are not alleging stigma alone, but also direct

harm to their members, caused by the fact that funding is now being diverted from NEA-supported programs to pay for NCLB requirements, such as testing. As for the plaintiff school districts, defendant argues that they are likewise asserting rights of third-parties—i.e., the States and all other school districts around the country. Although defendant acknowledges that the plaintiff school districts do allege injury to themselves, defendant argues that they are misinterpreting and misapplying the NCLB.

Plaintiffs note that at the pleading stage they need only allege facts in support of standing and, further, on a motion to dismiss the allegations of the complaint are accepted as true. Plaintiffs cite *Bennett v. Spear*, 520 U.S. 154, 168 (1997), for its statement that "general factual allegations of injury" are sufficient; and *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994), for the rule that a complaint should not be dismissed for lack of standing so long as "relief could be granted under any set of facts that could be proved consistent with the allegations."

The court is persuaded that standing has been adequately alleged. Plaintiffs claim they are being directly harmed by the NCLB's "unfunded mandates." Defendant's arguments would more properly be raised in support of a motion for summary judgment. At the pleading stage, however, the court must accept the allegations in the complaint as true. Plaintiffs have met their "relatively light" burden of alleging injury, causation and redressability. Therefore, the court shall not dismiss the complaint for lack of standing.

Defendant's second argument is that the complaint should be dismissed for failure to state a claim. De-

fendant submits that plaintiffs are reading too much into the section of the NCLB cited in the complaint. As noted above, plaintiffs' entire case is based on 20 U.S.C. § 7907(a), section 9527(a) of the Act, which states:

> (a) General prohibition
>
> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

Defendant argues convincingly that this sentence simply means no federal "officer of employee" can require states or school districts to "spend any funds or incur any costs not paid for under this Act." This does not mean that *Congress* could not do so, which it obviously has done by passing the NCLB Act. Defendant also argues that it would make no sense for Congress to pass this elaborate statute—which does require many things of States and school districts as a condition of receiving federal education funds—if the States could avoid the requirements simply by claiming that they have to spend some of their own funds in order to comply with those requirements.

The court is convinced by defendant's argument that plaintiffs' reading of the statute is defeated by inclusion of the words "an officer or employee of." If Congress had meant that federal funding would pay for 100% of all NCLB requirements, then the inclusion of these words would have been unnecessary. If Congress meant to prohibit "unfunded mandates" in

the NCLB, it would have phrased 20 U.S.C. § 7907(a) to say so clearly and unambiguously. By including the words "an officer or employee of," Congress clearly meant to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute. If, as plaintiffs contend, Congress intended to prohibit unfunded mandates, it would have omitted the words "an officer or employee of" or simply stated that the Federal Government will reimburse the States for all costs they incur in complying with the requirements of this statute. Congress has appropriated significant funding for NCLB requirements. *See* 20 U.S.C. § 6302(a). However, plaintiffs have pointed to no statutory provision other than § 7907(a) to support their argument that Congress intended for these requirements to be paid for *solely* by the federal appropriations.

In short, 20 U.S.C. § 7907(a) cannot reasonably be interpreted to prohibit Congress itself from offering federal funds on the condition that States and school districts comply with the many statutory requirements, such as devising and administering tests, improving test scores, and training teachers. The statute plaintiffs cite does not support their claim. Accordingly,

IT IS ORDERED that defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is granted.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES
DISTRICT JUDGE

Dated: 11/23/2005
Detroit, Michigan

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-2708

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Plaintiffs-Appellants,
v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 05-71535-Bernard A. Friedman, Chief District Judge.

Argued: November 28, 2006

Decided and Filed: January 7, 2008

Before: COLE and McKEAGUE, Circuit Judges; BREEN, District Judge.*

COUNSEL

ARGUED: Robert H. Chanin, BREDHOFF & KAISER, Washington, D.C., for Appellants. Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washing-

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* The Honorable J. Daniel Breen, United States *District Judge* for the Western District of Tennessee, sitting by designation.

ton, D.C., for Appellee. ON BRIEF: Robert H. Chanin, Alice Margaret O'Brien, Jeremiah A. Collins, BREDHOFF & KAISER, Washington, D.C., Dennis R. Pollard, THRUN LAW FIRM, Bloomfield Hills, Michigan, for Appellants. Alisa B. Klein, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. Joseph M. Miller, PENNSYLVANIA DEPARTMENT OF EDUCATION, Harrisburg, Pennsylvania, Kari Krogseng, James C. Harrison, REMCHO, JOHANSEN & PURCELL, San Leandro, California, Gene C. Lange, LUMAN, LANGE, THOMAS & MCMULLEN, Washington, D.C., Richard Blumenthal, ATTORNEY GENERAL OF THE STATE OF CONNECTICUT, Hartford, Connecticut, for *Amici Curiae*.

COLE, J., delivered the opinion of the court, in which BREEN, D. J., joined. McKEAGUE, J. (pp. 19-29), delivered a separate dissenting opinion.

OPINION

R. GUY COLE, Jr., *Circuit Judge*. This case requires us to decide a fundamental question of federal versus state funding under the No Child Left Behind Act of 2001 ("NCLB" or "the Act"), 20 U.S.C. §§ 6301-7941. Plaintiffs-Appellants are school districts and education associations that receive federal funding under NCLB in exchange for complying with the Act's various educational requirements and accountability measures. Based on the so-called "Unfunded Mandates Provision," which provides that "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act," 20 U.S.C. § 7907(a), Plaintiffs filed suit in district court against the Secretary of Education

seeking, among other relief, a judgment declaring that they need not comply with the Act's requirements where federal funds do not cover the increased costs of compliance. The district court concluded, however, that Plaintiffs must comply with the Act's requirements regardless of any federal-funding shortfall and accordingly granted the Secretary's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Because statutes enacted under the Spending Clause of the United States Constitution must provide clear notice to the States of their liabilities should they decide to accept federal funding under those statutes, and because we conclude that NCLB fails to provide clear notice as to who bears the additional costs of compliance, we REVERSE the judgment of the district court and REMAND this case for further proceedings consistent with this opinion.

I. BACKGROUND

A. The No Child Left Behind Act

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act. The Act—a comprehensive, and in some quarters controversial, educational reform—amended the Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941 (2003)). *See Connecticut v. Spellings*, 453 F. Supp. 2d 459, 468 (D. Conn. 2006). The ESEA targeted funding to students in low-income schools, and its purposes included overcoming "any effects of past racial discrimination." *George v. O'Kelly*, 448 F.2d 148, 151 (5th Cir. 1971); *accord Barrera v. Wheeler*, 475 F.2d 133 8, 1340 (8th Cir. 1973); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 851 (5th Cir. 1966). The ESEA was

periodically reauthorized and amended over the next few decades.

In contrast to prior ESEA iterations, NCLB "provides increased flexibility of funds, accountability for student achievement and more options for parents." 147 Cong. Rec. S13365, 13366 (2001) (statement of Sen. Bunning). The Act focuses federal funding more narrowly on the poorest students and demands accountability from schools, with serious consequences for schools that fail to meet academic-achievement requirements. *Id.* at 13366, 13372 (statements of Sens. Bunning, Landrieu, and Kennedy). States may choose not to participate in NCLB and forego the federal funds that accompany the Act. If they do accept the funds, they must comply with NCLB requirements. *See, e.g.*, 20 U.S.C. § 6311 ("For any State *desiring* to receive a grant under this part, the State educational agency shall submit to the Secretary a plan . . . .") (emphasis added); *see also Spellings*, 453 F. Supp. 2d at 469 ("In return for federal educational funds under the Act, Congress imposed on states a comprehensive regime of educational assessments and accountability measures.").

Title I, Part A, of NCLB, titled "Improving Basic Programs Operated by Local Educational Agencies," continues to pursue the objectives of the original ESEA and imposes the most extensive educational requirements on participating States and school districts, and likewise provides the largest amount of federal appropriations to participating States. For example, in 2005-06, NCLB authorized $22.75 billion in appropriations for Title I, Part A, compared to $14.1 billion for the remaining 26 parts of NCLB combined. Title I, Part A's stated purposes include meeting "the educational needs of low-achieving

children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance." 20 U.S.C. § 6301(2).

In addition to Title I, Part A, NCLB establishes numerous other programs, including a literacy initiative for young children and poor families (Title I, Part B); special services for the education of children of migrant workers (Title I, Part C); requirements that all teachers be "highly qualified" (Title II, Part A); and instruction in English for children with limited English ability (Title III). Plaintiffs' complaint focuses on the educational requirements and funding provisions of Title I, Part A.

To qualify for federal funding under Title I, Part A, States must first submit to the Secretary a "State plan," developed by the state department of education in consultation with school districts, parents, teachers, and other personnel. *Id.* § 6311(a)(1). A State plan must "demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards" against which to measure the academic achievement of the State's students. *Id.* § 6311 (b)(1)(A). The standards in the plan must be uniformly applicable to students in all the State's public schools, and must at least cover reading, math, and science skills. *Id.* § 6311(b)(1)(C).

States must also develop, and school districts must administer, assessments to determine students' levels of achievement under plan standards. *Id.* § 6311(b)(2)(A). These assessments must be able to show the percentage of students achieving proficiency among "economically disadvantaged students," "stu-

dents from major racial and ethnic groups," "students with disabilities," and "students with limited English proficiency." *Id.* § 6311(b)(2)(C)(v)(II). Schools and districts are responsible for making "adequate yearly progress" ("AYP") on these assessments, meaning that a minimum percentage of students, both overall and in each subgroup, attains proficiency. 34 C.F.R. § 200.20(a)(1).

Failure of a school to make AYP triggers other requirements of Title I, Part A. If a school fails to make AYP for two consecutive years, it must be identified by the local educational agency for school improvement. 20 U.S.C. § 6316(b)(1)(A). Among other things, a school in improvement status must inform all of its students, including those who have been assessed as proficient, that they are permitted to transfer to any school within the district that has not been identified for school improvement. *Id.* § 6316(b)(1)(E)(i). The school must also develop a two-year plan setting forth extensive measures to improve student performance, including further education for teachers and possible before-or after-school instruction, or summer instruction. *Id.* §§ 6316(b)(3)(A)(iii), (ix).

If a school does not make AYP after two full years of improvement status, it is "identif[ied] . . . for corrective action." *Id.* § 6316(b)(7)(C)(iv). Corrective action involves significant changes, such as replacing teachers who are "relevant to the failure to make [AYP]," or instituting an entirely new curriculum. *Id.* If after a full year of corrective action a school has still not made AYP, the district must restructure the school entirely; options for restructuring include "[r]eopening the school as a public charter school," replacing the majority of the staff, or letting the

State's department of education run the school directly. *Id.* § 6316(b)(8)(B).

With enumerated exceptions, under NCLB "the Secretary may waive any statutory or regulatory requirement . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that . . . receives funds under a program authorized by this Act." 20 U.S.C. § 7861(a).

NCLB also requires that States use federal funds made available under the Act "only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds." 20 U.S.C. § 6321(b)(1). That is, States and school districts continue to be responsible for the majority of the funding for public education and the funds distributed under Title I should be used only to implement Title I programming, not as a substitute to the funds that are already being used for general programming.[1]

However, while Plaintiffs recognize that the majority of the funding for education continues to come from state and local sources, the Plaintiffs contend that NCLB does not require them to spend

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[1] Contrary to the dissent's contention that victory by the Plaintiffs in this case will result in a fundamental change in this nation's funding scheme for education, the Plaintiffs do not argue that the funds distributed by NCLB are a substitute for those funds that have historically come from state and local sources. Instead, Plaintiffs argue only that they should not be required to incur additional funding obligations-those necessary to comply with NCLB that would not be incurred absent the State's attempt at compliance with NCLB.

the money drawn from state and local sources on the additional programs created as required by NCLB. At the heart of this case is § 7907(a), often referred to as the "Unfunded Mandates Provision," which Plaintiffs argue provides that they need not comply with the Act's requirements where federal funding does not cover the additional costs of complying with those requirements. Section 7907 is entitled "Prohibitions on Federal government and use of Federal funds," and subsection 7907(a) provides as follows:

> General prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof *to spend any funds or incur any costs not paid for under this Act*.

20 U.S.C. § 7907(a) (emphasis added). Plaintiffs note that former Secretary of Education Rod Paige has explained that "[t]here is language in the bill that *prohibits requiring anything that is not paid for*." (Joint Appendix ("JA") 21 (quoting Paige statement of Dec. 2, 2003) (emphasis added).)

B. Procedural History

As mentioned, Plaintiffs-Appellants are school districts and education associations. The eight school districts are Pontiac School District, Laredo Independent School District, Leicester Town School District, Neshobe Elementary School District, Otter Valley Union High School, Pittsford Town School District, Sudbury Town School District, and Whiting Town School District. Rutland Northeast Supervisory

Union, which contains eleven school districts, is also a Plaintiff-Appellant. The education association Plaintiffs-Appellants are the National Education Association (NEA) and ten NEA-affiliate education associations: the Connecticut Education Association, the Illinois Education Association, the Michigan Education Association, the Ohio Education Association, the Reading Education Association, the Utah Education Association, the Indiana State Teachers Association, the Texas State Teachers Association, NEA-New Hampshire, and the Vermont NEA.

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan against the Secretary, alleging, based on § 7907(a), that the Act does not require school districts to comply with NCLB educational requirements if doing so would require the expenditure of state and local funds to cover the additional costs of compliance. (*See, e.g.*, Plaintiffs Reply Br. 6 ("Plaintiffs' position is simply that the Secretary may not require states and school districts to take actions mandated by the NCLB that the states and school districts would not undertake absent the NCLB's mandates, if doing so would require the states or school districts 'to spend any funds or incur any costs not paid for under [the NCLB].'") (alteration in original).) The complaint alleged in the alternative that the Act is ambiguous regarding whether school districts are required to spend their own funds, and that imposing such a requirement would therefore violate the Spending Clause of the United States Constitution.

Plaintiffs alleged that in the years following the enactment of NCLB, Congress has not provided States and school districts with sufficient federal funds to comply fully with the Act. For example, for

the five years from fiscal year 2002 to fiscal year 2006, Congress appropriated $30.8 billion dollars less for Title I grants to school districts than it authorized in NCLB. (JA 27.) Plaintiffs sought a declaratory judgment to the effect that "states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB." (JA 67.) Plaintiffs also sought an injunction prohibiting the Secretary from "withholding from states and school districts any federal funds to which they are entitled under the NCLB because of a failure to comply with the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds to achieve such compliance." (*Id.*)

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The district court focused on the first part of § 7907(a), which, for clarity, we restate in full below:

> General prohibition. Nothing in this Act shall be construed to authorize *an officer or employee* of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a) (emphasis added). The court concluded that "[b]y including the words 'an officer or employee of,' Congress clearly meant [merely] to prohibit federal officers and employees from imposing

additional, unfunded requirements, beyond those provided for in the statute." *Sch. Dist. of Pontiac v. Spellings*, No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253, at *12 (E.D. Mich. Nov. 23, 2005). "This does not mean," the court explained, "that *Congress* could not [require States or school districts to spend any funds or incur any costs not paid for under this Act], which it obviously has done by passing the NCLB Act." *Id.* at *11 (emphasis in original). In other words, the district court read § 7907(a) merely to prohibit federal officers and employees from imposing requirements that were not authorized by the Act on States and school districts. The district court rejected Plaintiffs' argument that § 7907(a) excuses compliance with requirements of the Act that impose additional costs on the States not funded by the federal government.

Plaintiffs appealed.

II. DISCUSSION

A threshold question is whether this case is properly before us. Although the parties litigated standing in the district court, which concluded that Plaintiffs had standing, neither party has addressed the issue on appeal. We must, however, address standing where it is in question, even if the parties have not raised the issue. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below."). Accordingly, we first address whether Plaintiffs have standing, and then—after answering that question in the affirmative—conclude that they have stated a claim upon which relief can be granted based on § 7907(a) in light of the Supreme Court's Spending Clause jurisprudence.

A. Standing

We review de novo the question of standing. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). "[P]laintiffs, as the parties now asserting federal jurisdiction," have the burden of establishing standing. *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1861 (2006). To satisfy the constitutional requirement of standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury suffered must be "an invasion of a legally protected interest." *United States v. Hays*, 515 U.S. 737, 743 (1995). This tripartite standing requirement is applicable to claims under NCLB. *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) (citing *Lujan*, 504 U.S. at 560-61).

Here, because the complaint was dismissed at the pleading stage, the assessment of standing is confined to the allegations in the complaint. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice"; more is required to defeat a motion for summary judgment and yet more for a decision on the merits. *Lujan*, 504 U.S. at 561.

As discussed below, the Plaintiff school districts meet the three requirements for standing based on their allegation that they must spend state and local funds to pay for NCLB compliance. Since at least one Plaintiff in this action has standing, there is no need to consider whether the education association Plaintiffs also have standing. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 431 (1998); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Additionally, we need not address whether Plaintiff school districts' other alleged injuries are sufficient to establish standing. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (finding standing where, although one alleged injury might not occur "for thousands of years," another injury would allegedly occur very soon).

1. *Injury in Fact*

Plaintiff school districts, and the supervisory union, allege that they must spend state and local funds to pay for NCLB compliance:

> Because of the multibillion dollar national funding shortfalls of NCLB, and the insistence by [the Secretary] that . . . school districts comply fully with all of the NCLB mandates imposed upon them even if NCLB funds that they receive are insufficient to pay for such compliance, . . . school districts have had and will have to spend a substantial amount of non-NCLB funds to comply with those mandates, diverting those funds from other important educational programs and priorities, such as programs for gifted and talented students, courses in foreign languages, art, music, computers, and other non-NCLB subjects, class size reduction efforts, and extracurricular activities.

(JA 61-62.) The districts also allege that if they do not comply with all NCLB requirements, including those whose costs exceed NCLB funding, the districts "face the withholding [by the Secretary] of federal funds to which they otherwise are entitled under the NCLB." (JA 65.) Additionally, the districts claim that inadequate federal funding has caused low rates of student proficiency on standardized tests.

The current Secretary has consistently maintained that school districts must comply with NCLB requirements even if they must spend non-federal funds to do so. Plaintiffs contend that, based on 20 U.S.C. § 7907(a), NCLB does not require compliance beyond that for which federal funds will pay. Plaintiff districts allege that the Secretary's insistence that school districts comply fully with NCLB has already forced Plaintiffs to spend state and local funds on NCLB requirements and will continue to require such expenditures in the future. Because this injury has already occurred and is ongoing, it is concrete and actual.

Moreover, the alleged ongoing need of Plaintiff districts to spend non-federal funds to comply with NCLB requirements is not dependent on the hypothetical actions of "decisions made by the appropriate [state] authorities, who are not parties to this case." *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (holding that city of Rochester taxpayers could not sue the town of Penfield on the theory that Penfield's zoning practices would increase Rochester taxes, because Rochester was not a party). That is, under NCLB, States do not have the discretion to decide that in the event of a federal-funding shortfall some districts will continue to receive their previous level of funding and others will not. Instead, under NCLB, state

departments of education "shall" allocate federal NCLB funds to counties or school districts based on formulas provided in NCLB and approved by the Secretary. 20 U.S.C. § 6333(a)(3). Thus, the "injury in this case . . . does not turn on the independent actions of third parties," but on NCLB's funding requirements, which dictate the quantum of funding provided to each school district. *Clinton*, 524 U.S. at 431 n.19. To the extent the funding received by Plaintiff districts under NCLB is insufficient to defray the cost of compliance with NCLB requirements, the districts have sustained a cognizable injury in fact.

2. *Traceability*

The requirement that Plaintiff districts spend non-federal funds to comply with NCLB is also fairly traceable to the challenged action of the Secretary. The Secretary has interpreted NCLB to mean that "'[i]f a state decides to accept the federal funds [offered under the NCLB], then it's required to implement the law in its entirety.'" (JA 21 (quoting Rodney Paige, Secretary, U. S. Dep't of Educ., Remarks to National Urban League (Mar. 25, 2004)) (alterations in original).) Thus, the Secretary has not granted waivers of NCLB educational requirements based on the insufficiency of federal funding.[2] Therefore, Plaintiff districts

[2] Due to the Secretary's uniform rejection of requests for waivers, Plaintiffs allege that "it would be futile for the plaintiff school districts to ask" for a waiver. (JA 22-23.) The Secretary does not dispute that a request would be futile, and neither party has addressed the exhaustion of administrative remedies. *See* 20 U.S.C. § 1234d (providing an opportunity for an administrative hearing before the Secretary withholds federal education funds); *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (providing a narrow exception to the exhaustion requirement); *Spellings*, 453 F. Supp. 2d at 485 (requiring that a plaintiff challenging NCLB exhaust administrative remedies first).

allege, they have spent non-federal funds to comply with NCLB requirements. If the Secretary were not enforcing compliance with NCLB requirements even when federal funds do not pay for compliance, school districts would either not have to spend these funds at all, or would be able to spend them on other educational initiatives they believe are important.

3. *Redressability*

Finally, Plaintiff districts' injury must be redressable by a favorable decision. Among other relief, Plaintiffs seek a declaratory judgment that "school districts are not required to spend non NCLB funds to comply with the NCLB mandates." (JA 67.) Such a judgment would forbid the Secretary from requiring the expenditure of non-federal funds on NCLB. This satisfies the redressability requirement.

B. Plaintiffs Have Stated a Claim That They Are Not Liable For the Additional Costs of Compliance With NCLB Requirements

We conclude that Plaintiffs have stated a claim under NCLB. In support of this conclusion, we first set forth the Spending Clause landscape governing this matter, focusing on the requirement that legislation enacted under the Spending Clause provide clear notice to the States of their liabilities under that legislation. We then conclude that NCLB, by its terms, fails to provide clear notice of the States' obligation to incur additional costs to comply with the Act's requirements. We additionally explain that the legislative history does not suggest that this notice is clear. Finally, we note that even the Defendant

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Therefore, we will not address the significance of the failure to exhaust such remedies at this stage in the litigation.

in this matter previously expressed a view of the contested funding provision that coincides with the interpretation that Plaintiffs urge here.

1. *The Clear-Notice Requirement Under the Spending Clause*

Congress enacted NCLB under the Spending Clause. U.S. Const. art. I, § 8, cl. 1; *see Spellings*, 453 F. Supp. 2d at 469. "Congress has broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, __ U.S. __, 126 S. Ct. 2455, 2459 (2006) (citing *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987)). "[B]ut when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), and *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982)). Legislation enacted under "'the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17). "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17). "By insisting that Congress speak with a clear voice," the Supreme Court enables States "to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17. Moreover, "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Id.* at 17-18.

In *Pennhurst*, the Supreme Court applied these principles to conclude that States participating in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 ("DDA"), 42 U.S.C. §§ 6000-6081, were not required to assume costs of providing certain treatment and services to mentally disabled citizens. 451 U.S. at 5. The DDA provided financial assistance to participating States to aid them in creating programs to care for and treat the mentally disabled. *Id.* at 11. The DDA also provided a variety of conditions for the receipt of federal funds, such as that the States submit a plan to evaluate the services provided under the DDA to the Secretary of the Department of Health and Human Services. *Id.* at 12. At the heart of the case was the DDA's "bill of rights" provision, which provided that mentally disabled citizens "have a right to appropriate treatment, services, and habilitation for such disabilities" to be provided "in the setting that is least restrictive of the person's personal liberty." *Id.* at 13 (quoting § 6010). The plaintiffs, certain disabled citizens of Pennsylvania (a participant in the DDA), sued their state-owned institution to enforce these "rights," that is, to compel Pennsylvania to pay for the costs of these services. *Id.*

The Supreme Court held, however, that the foregoing language in the DDA's "bill of rights" provision did not create enforceable obligations on the State. The Court explained that the provision's terms, "when viewed in the context of the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties." *Id.* at 22-23. The Court also noted that the Act's "plain language" supported this view. It stated that "[w]hen Congress intended to impose conditions on the grant of federal funds," as in other sections of the DDA, "it

proved capable of doing so in clear terms," by, for example, using the term conditioned. *Id.* at 23. This "bill of rights" section, "in marked contrast, in no way suggest[ed] that the grant of federal funds [was] 'conditioned' on a State's funding the rights described therein." *Id.* The Court further noted that the Federal Government had no authority under the DDA to withhold funds from States for failing to comply with this "bill of rights" section. *Id.* Accordingly, that section could "hardly be considered a 'condition' of the grant of federal funds." *Id.* The Court also explained that the funds Congress provided to Pennsylvania under the DDA were "woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting." *Id.* at 24. This confirmed that "Congress must have had a limited purpose in enacting" this provision because Congress "usually makes a far more substantial contribution to defray costs" when it "impose[s] affirmative obligations on the States." *Id.* "It defies common sense," the Court concluded, "to suppose that Congress implicitly imposed this massive obligation on participating States."[3] *Id.*

The Court reiterated that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide

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[3] In this case, Plaintiffs do not dispute that Congress did clearly intend to place a condition on the grant of federal funds. However, as the dissent notes, "there is no mention of the cost of compliance anywhere in the text of the NCLB." Dissenting Op. at 21. Plaintiffs argue that this silence cannot be taken as a clear statement that States and local governments would be required to expend their own funds to cover any shortfall of federal funds.

whether or not to accept those funds." *Id.* "That canon," the Court continued, "applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* "The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but *whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.*" *Id.* at 25 (emphasis added). Thus, the Court concluded that "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with" the "bill of rights" provision in the DDA. *Id.*

The Court recently applied these principles again in *Arlington*, where a similar question arose under the Individual with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400-1482. The IDEA, enacted under the Spending Clause, "provides federal funds to assist state and local agencies in educating children with disabilities and conditions such funding upon a State's compliance with extensive goals and procedures." *Arlington*, 126 S. Ct. at 2458 (internal quotation marks and citation omitted). Central to the dispute in *Arlington* was that the IDEA provided that a court "'may award reasonable attorneys' fees as part of the costs'" to parents who prevail in an action brought under the Act. *Id.* at 2459 (quoting 20 U.S.C. § 1415(i)(3)(B)).

The plaintiffs in *Arlington* sued under the IDEA on behalf of their son to require the Arlington Board of Education to pay for their son's private-school tuition for specified school years. *Id.* at 2457. The plaintiffs prevailed in the district court, and the Second Circuit affirmed. *Id.* at 2458. As prevailing parents, the plaintiffs then sought fees under the aforementioned

provision for the services of an educational consultant who assisted them throughout the IDEA proceedings. *Id.*

Noting that "resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause," the Supreme Court ultimately held that the plaintiffs were not entitled to these expert fees. *Id.* The Court reaffirmed *Pennhurst*'s principle requiring clear notice to States of their obligations under such legislation, and the Court further explained how that principle applies. *Id.* at 2459. The Court stated that it "must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." *Id.* The Court "must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees." *Id.* "In other words," the Court continued, "we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case." *Id.*

Applying these principles, the Court first considered the IDEA text. *Id.* ("In considering whether the IDEA provides clear notice, we begin with the text."). The Court noted that it has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* (citation omitted). The Court then explained that, although the IDEA fee provision "provides for an award of 'reasonable attorneys' fees,' this provision does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." *Id.* Accordingly, the Court rejected the

plaintiffs' argument that, because expert fees amounted to "costs" in IDEA proceedings and because the provision allowed for reasonable attorneys' fees "as part of the costs," the plaintiffs were entitled to expert fees. *Id.* at 2459-60. The Court explained that the provision "certainly fails to provide the clear notice that is required under the Spending Clause." *Id.* at 2460.

The Court then explained that other provisions of the IDEA supported this view of the text. For example, the IDEA had detailed provisions to ensure that attorneys' fees were reasonable, but lacked comparable provisions regarding expert fees. *Id.* Additionally, the Court concluded that its holding was consistent with prior cases addressing the definitions of costs and fees. *Id.* at 2461-62.

The Court remained unswayed in this conclusion even in light of evidence that Congress intended precisely the opposite interpretation—that is, that States must compensate prevailing parents for expert fees. The plaintiffs explained that Congress approved a Conference Report stating that "[t]he conferees intend[ed] that the term 'attorneys' fees as part of the costs' *include reasonable expenses and fees of expert witnesses* . . . ." *Id.* at 2462 (quoting H.R. Conf. Rep. No. 99-687, at 5) (emphasis added). "No Senator or Representative voiced *any* opposition to this statement in the discussion preceding the vote on the Conference Report-the last vote on the bill before it was sent to the President." *Id.* at 2466 (Breyer, J., dissenting) (emphasis in original). The Court explained that, "[u]nder these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough." *Id.* at 2463.

"In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but *what the States are clearly told* regarding the conditions that go along with the acceptance of those funds." *Id.* (emphasis added). This legislative history, therefore, was not "sufficient to provide the requisite fair notice" that States bore this liability under the IDEA. *But see id.* at 2466 (Breyer, J., dissenting) ("I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.").

2. *NCLB's Lack of Clear Notice Regarding State Funding Obligations*

a. *Text of the Act*

Turning to the present case, *Arlington* instructs that we must view NCLB from the perspective of a state official who is engaged in the process of deciding whether the State should accept NCLB funds and the obligations that accompany those funds. In other words, we must determine whether NCLB furnishes clear notice to the official that her State, if it chooses to participate, will have to pay for whatever additional costs of implementing the Act that are not covered by the federal funding provided for under the Act. Or, as one might phrase the question, whether that state official would clearly understand that one of the State's obligations under the Act is the obligation to incur costs not paid for under the Act. Because § 7907(a) explicitly provides that "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act," a state official would not clearly understand that obligation to exist. To the contrary, based on this text, a state official could plausibly contend that she understood exactly

the opposite—that her State need not comply with NCLB requirements for which federal funding falls short.

That is not to say, however, that the Secretary's interpretation of the Act (discussed in more detail below) is frivolous. Indeed, perhaps the Secretary's view of the text is ultimately correct. But the only relevant question here is whether the Act provides *clear notice to the States* of their obligation. *See Arlington*, 126 S. Ct. 2463 ("In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."). With this rule in mind, we turn to the Secretary's interpretations of the text and explain why they do not persuade us that the States' funding obligations are clear.

b. *The Secretary's Interpretations of the Text*

There are essentially two other interpretations of § 7907(a) advanced in this case, both of which would require the States to fully fund in compliance with NCLB regardless of federal funding. The first, which the district court adopted, is that this section merely prevents officers and employees of the federal government from imposing additional, unauthorized requirements on the participating States. The second is that this section simply emphasizes that State participation in NCLB is entirely voluntary, but that once a State chooses to participate, it must fully comply with NCLB requirements regardless of federal funding. As discussed below, neither of these interpretations is evident.

(1) *Stopping Rogue Federal Officers or Employees*

The view that § 7907(a) simply restricts federal officials from imposing additional requirements-that is, those not authorized by the Actin participating States arises from the first part of § 7907(a), which discusses "an officer or employee of the Federal Government." This reading, as shown in italics below, interprets the Act to preclude any such officer or employee from mandating that a State incur costs not paid for under (that is, not authorized by) the Act:

> General prohibition. *Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to* mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or *mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.*

20 U.S.C. § 7907(a) (emphasis added).

The district court accepted this interpretation when dismissing Plaintiffs' suit for failure to state a claim. *Pontiac*, 2005 U.S. Dist. LEXIS 29253, at *12. As the district court explained, "Defendant argues convincingly that this sentence simply means no federal 'officer or employee' can require states or school districts to 'spend any funds or incur any costs not paid for under this Act.'" *Id.* at *11. The court further explained that, "[b]y including the words 'an officer or employee of,' Congress clearly meant to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute." *Id.* at *12. In sum, the

court concluded that § 7907 merely prevents rogue officers from imposing requirements not authorized by the Act. There are two problems with this interpretation.

First, even if the Government presented a convincing argument that Congress intended this meaning, the requirements of the Spending Clause still would not have been met as this reading certainly falls short of being so evident that a State would clearly understand it to be the interpretation Congress intended.

Second, it is not evident that the *officer or employee* language modifies the final clause discussing States incurring costs under the Act. In other words, the *officer or employee* language is reasonably read to modify only the middle clause regarding state and local control over curriculum, as follows: "Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources . . . ." This reading leaves the final clause to be modified simply by the opening clause, as follows: "Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." In this way, the Act simply prevents federal officers from controlling school curriculum and allocation of local funds, but says nothing about these officers mandating States to spend funds or incur costs for unauthorized obligations.

Third, even assuming that the *officer or employee* language modifies the final clause, more fundamental problems emerge. For one, the Secretary's view that this section is intended to prevent federal officers

from imposing unauthorized requirements on States would have us substitute words that are not in the statutory text ("Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not [*authorized under this Act*]") for words that are in the text (". . . or incur any costs *not paid for under this Act*"). Stating that a federal officer cannot require a State to incur any costs "not paid for" under the Act is, to say the least, an unusual way of prohibiting an officer from forcing a State to incur costs for something that is not *authorized* under the Act. Were Congress truly concerned about this sort of ultra vires conduct by federal officers and employees, it could have said so expressly. Moreover, nothing in the legislative history (discussed in more detail below) suggests that this was Congress's concern. Yet even if this were what Congress meant, we would be left with the following tautology: This Act does not authorize federal officers or employees to require that States incur costs for anything that the Act does not authorize. We doubt that Congress intended this empty meaning.

For these reasons, we find this rogue-officer interpretation unconvincing. In any event, the interpretation is not so evident that a State would clearly understand it to be the interpretation Congress intended, and thus the interpretation cannot save the Act from violating the Spending Clause.

(2) Emphasizing that Participating in the Act is Voluntary

The Secretary also contends that the reference in the final clause of § 7907(a) to a State's costs under the Act simply emphasizes that a State's decision to

accept federal funding under NCLB in exchange for complying with requirements under the Act is entirely voluntary. The Secretary notes that this section provides limits on what the Act (or, if one accepts the reading discussed above, on what federal officers and employees) can "mandate" the States to do:

> General prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to *mandate*, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or *mandate* a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a) (emphasis added). The Secretary explains, "as Congress fully understood, a statute [such as NCLB] that imposes conditions on a receipt of federal funds is not a 'mandate.'" (Secretary's Br. 22.) The Secretary here contends that nothing in the Act is a mandate, but that this section simply "ensured that States would not be subject to mandates that formed no part of the conditions set out in the statute." (*Id.*) The Secretary additionally notes that the Unfunded Mandates Act ("UMA"), 2 U.S.C. § 658(5)(A)(i)(I), defines "federal intergovernmental mandate" to exclude voluntary participation with federal programs. (*Id.*)

But Plaintiffs' contention is not that NCLB as a whole is an unfunded mandate forced upon the States; they appear will if to concede that it is a voluntary program, and their argument focuses on

§ 7907(a), not the UMA.[4] Plaintiffs argue that, *now that they are participating* in NCLB, the Secretary is imposing (that is, "mandating") liabilities that they simply did not bargain for—and that were expressly excused by § 7907(a)—when they signed on to NCLB. This view is reasonable, and there are at least three additional reasons why the Act does not provide clear notice that § 7907(a) speaks merely to the voluntariness of the program as opposed to relieving the States of their obligation to comply with unfunded requirements.

First, based on the plain language of § 7907(a), it is not apparent that this section speaks to the question of voluntary participation in NCLB as opposed to States' obligations—such as complying with requirements where federal funding falls short—after the States have agreed to participate (whether voluntarily or by coercion or otherwise). It would be one thing if the Act stated that nothing in it shall be construed to mandate a State to "comply with the Act" or that nothing in the Act shall be construed to mandate a State to "incur any costs under this Act"-language like that would indicate that States can simply

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[4] A question has been raised, however, whether a State can, as a practical financial matter, refuse federal funding under NCLB. (*See, e.g.*, *Amicus Curiae* Br. of the Governor of the Commonwealth of Pennsylvania at 20 (noting that "states have come to depend upon [federal] funds to provide extra assistance to students who are economically and academically disadvantaged" and that "states are coerced to accept additional and financially burdensome requirements, so that they may continue to provide services and programs that they have offered to their neediest students for years").) *See also New York v. United States*, 505 U.S. 144, 175 (1992) (noting in another context that "Congress has crossed the line distinguishing encouragement from coercion").

choose not to comply with the Act altogether. Instead, however, the text provides that nothing in the Act shall be construed to mandate a State to "incur any costs *not paid for under this Act*"—language that a State could reasonably interpret to relate to its obligations after it has agreed to comply with the Act. Indeed, Vermont is one such State. It passed a law, based on this text, providing that neither the State nor its subdivisions will be required to "incur any costs not paid for under the Act *in order to comply with the provisions of the Act*." 16 V.S.A. § 165 (emphasis added). In short, it is not apparent that § 7907(a) relates merely to the States' freedom to choose whether to opt into the Act in the first place.

Second, the use of the exact language of § 7907(a) in the Perkins Vocational Education Act, 20 U.S.C. §§ 2301-2471 (1988), shows that the language is not about voluntary compliance; it is about a State's funding obligations under NCLB. Under the Perkins Act, federal grants are issued to "assist the States to expand, improve, modernize, and develop quality vocational education programs in order to meet the needs of the Nation's existing and future work force for marketable skills and to improve productivity and promote economic growth." *Pennsylvania v. Riley*, 84 F.3d 125, 127 (7th Cir. 1996) (citing 20 U.S.C. § 2301(1)). Section 2306a of the Perkins Act, entitled "Prohibitions," replicates NCLB's § 7907(a), but adds a final clause:

> (a) Local control. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate

> a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act, *except as required under sections 112(b), 311(b), and 323.*

20 U.S.C. § 2306a(a) (emphasis added). The sections of the Perkins Act referred to in this final clause require agencies in States participating in the Act to spend non-federal funds. *See, e.g.*, 20 U.S.C. § 2413(a) (Perkins Act § 323) ("Except as provided in subsection (b), for each fiscal year for which an eligible agency *receives assistance under this Act*, the eligible agency shall provide, *from non-Federal sources for the costs the eligible agency incurs for the administration of programs under this Act*, an amount that is not less than the amount provided by the eligible agency from non-Federal sources for such costs for the preceding fiscal year.") (emphasis added). Thus, the preceding language in § 2306a(a), which mirrors NCLB § 7907(a), explains that participating States need not spend their own funds to comply with the Perkins Act; the final clause—absent in NCLB—provides the explicit exceptions describing *when participating States do have to expend their own funds*. The common language in these Acts therefore does not simply reiterate that States may or may not participate in the federal program.

The dissent is correct in noting that there are differences between the Perkins Act and NCLB. However, the differences in the overall structure of the statutes do not negate the informative role that the identical 62-word provision found in both of the statutes can provide. In the Perkins Act, the 62-word provision is followed by exceptions to the provision. In NCLB, the 62-word provision is followed by no exceptions. The difference between the Perkins Act

and NCLB in this regard shows that Congress is capable of explicitly stating when States must provide funding under these Acts. *Cf. Pennhurst*, 451 U.S. at 17-18 ("[I]n those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly."). The dissent's conclusion that these identical 62-word statutory phrases in the Perkins Act and NCLB have fundamentally different meanings because the Acts have "different relationship[s] between requirements and funding," Dissenting Op. at 24, would be anything but clear to a reasonable state official.

Third, comparison of the use of the word "mandate" in § 7907(a) with the provisions of the UMA shed little light here, as (1) NCLB makes no reference to the UMA's definition of "mandate," which excludes voluntary participation in federal programs, and (2) "the label 'mandate' is often applied to obligations that states assume voluntarily in order to qualify for federal funds." Patricia T. Northrop, Note, *The Constitutional Insignificance of Funding for Federal Mandates*, 46 Duke L.J. 903, 903 n.2 (1997). Indeed, another section of the UMA itself defines "mandate" to *include* a duty arising from voluntary participation in federal programs. 2 U.S.C. § 1555 (defining the phrase for purposes of a commission that would review federal mandates); *see also* Makram B. Jaber, Comment, *Unfunded Federal Mandates: An Issue of Federalism or a "Brilliant Sound Bite"?*, 45 Emory L.J. 281, 288 (1996) ("Read liberally, this definition [in Section 1555] considers as an 'unfunded federal mandate' any federal statute or regulation that results in any duties imposed on state or local governments, even if the state takes on such duties voluntarily, so long as the resulting costs to these

governments are not directly and fully funded by the federal government.").

For all of these reasons, we conclude that if NCLB requires States to comply with all NCLB requirements even where States must incur additional costs not paid for through federal funds, there is no clear notice of that obligation. But we pause to emphasize one final point. There is no real dispute that States and school districts participating in NCLB must fulfill the Act's various educational and accountability requirements, such as submitting plans to the Secretary, effectively tracking student achievement, and so forth. In that respect, the States are on clear notice of these obligations. And, as the Secretary points out, that stands in contrast to *Pennhurst*, where the hortatory "bill of rights" in the DDA did not create legal obligations on the State, *see* Dissenting Op. at 17, and to *Arlington*, where the IDEA's arguable grant of expert fees to prevailing parties was not explicit in the text and therefore created no such obligation on the States. But Plaintiffs here do not contend that their obligation to comply with NCLB's various educational requirements is in any way unclear. *See* Dissenting Op. at 27. They contend that their obligation to spend additional funds or incur additional costs for that compliance is unclear. As *Arlington* instructs, "we must ask whether the [NCLB] furnishes clear notice regarding *the liability at issue in this case*." 126 S. Ct. at 2459 (emphasis added). Faced with § 7907(a), which provides in a catchall phrase that "*[n]othing in this Act shall be construed*" to require States and localities to "spend any funds or incur any costs not paid for under the Act," we conclude that Plaintiffs' liability in this respect is anything but clear. Accor-

dingly, the Secretary's interpretations of § 7907(a) violate the Spending Clause.

c. *Legislative History*

Our conclusion that NCLB fails to provide requisite notice to States of their funding obligations under the Act rests on the plain meaning of the statutory text, as discussed above.[5] We note, moreover, to the extent that legislative history informs this question, that legislative history supports our conclusion. In this way, the Spending Clause violation here is even more apparent than it was in *Arlington*, where the Court found a lack of clear notice of the States' liabilities even where Congress explicitly stated that it intended the States to assume those liabilities. *See Arlington*, 126 S. Ct. at 2465.

As mentioned, NCLB was first passed as the Elementary and Secondary Education Act of 1965. The language of § 7907(a) was included in three education statutes that Congress enacted in 1994: (1) the Goals 2000 Educate America Act, Pub. L. 103-227 (enacted in March 1994 to provide funding for States to set some of the academic standards that NCLB ultimately mandated); (2) the School to Work Opportunities Act, Pub L. 103-229 (enacted in May 1994 to provide funding for certain work-related education

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[5] The dissent apparently disagrees. See Dissenting Op. at 23. ("[A]ny reasonable state official, reading the NCLB with a clear eye, would understand that there was no guarantee that federal funds would match all of the costs controlled and incurred by states and local school districts.") The dissent argues that fluctuating appropriations and unpredictable costs of compliance lend support to this conclusion. *See* Dissenting Op. at 22. However, this argument does not provide clarity regarding who bears the cost of a reduced level of federal funding or higher-than-expected costs of compliance.

programs); and (3) the October 1994 reauthorization of the ESEA, titled the Improving America Schools Act (IASA), Pub. L. 103-382. The text of § 7907(a) was carried over to NCLB without significant change from these 1994 statutes. The 1993-94 legislative debates regarding the language are therefore informative. *See W. Pac. R.R. Corp. v. W. Pac. R.R.*, 345 U.S. 247, 251 (1953) (considering legislative debate regarding earlier proposal to construe later proposal regarding the same topic).

Representatives Goodling and Condit introduced the first part of the language forming the basis of § 7907(a) on the floor of the House during the debate over Goals 2000. Although Goals 2000 lacked NCLB's mandatory testing and penalty structure, it required States to submit plans to the federal government showing how they would achieve high academic standards for their students, identify low-performing schools, and set goals for teacher certification. The introduced text, equivalent to the first part of § 7907(a), provided as follows:

> Nothing in this section shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State and local resources.

139 Cong. Rec. H7769 (daily ed. Oct. 13, 1993). Rep. Goodling explained that the language prohibiting federal government control over the "allocation of State and local resources" was intended to "put to rest the concern that we are going to dictate from the Federal level that somewhere, some way, the local and State Governments will find money for our dictates." 139 Cong. Rec. H7741 (daily ed. Oct 13,

1993). As Rep. Condit explained, "I believe that it is wrong for us on the Federal level to pass legislation but shift the costs of implementation and compliance to our State and local governments." 139 Cong. Rec. H7769 (daily ed. Oct 13, 1993).

The final language of this provision in Goals 2000—which would also ultimately appear in § 7907(a)—came from the Senate, which incorporated the Goodling-Condit language above and added the second phrase: " . . . or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 140 Cong. Rec. S626 (daily ed. Feb. 2, 1994) (amendment no. 1358, as modified). As explained by its sponsor Sen. Gregg, the amendment's purpose was "to assure that this bill will not become an unfunded mandate . . . to make it clear that if the Federal Government tells the State to do something or tells the local community to do something, the Federal Government will have to pay for the costs of that mandate." *Id.* The Senate version of the provision was then accepted and became the enacted language in the Goals 2000 Act. H. Conf. Rpt. 107-446 (Mar. 21, 1994). This same provision was added to the School to Work Opportunities Act, which was also pending at that time. H. Conf. Rpt. 103-480 (Apr. 19, 1994).

The provision was then included in the IASA, the direct predecessor to NCLB. Before the language was added to the IASA, early debates in the House included criticisms that the bill "provides all the mandates, but no money to pay for them. The Federal Government makes a multitude of new demands, but it is accountable for none." 140 Cong. Rec. H807 (daily ed. Feb. 24, 1994) (Rep. Barrett). Sen. Durenberger noted instead that the "amendment regarding

unfunded mandates, which is not part of this legislation, clearly states that if any requirement in this bill results in an unfunded mandate, affected States and communities do not have to comply." 140 Cong. Rec. S14205 (daily ed. Oct. 5, 1994).

Plaintiffs contend that this legislative history confirms that under § 7907(a) they need not comply with NCLB requirements that are not adequately funded. In light of the statements recounted above, this is an entirely supportable position. The Secretary argues, however, that these same statements support her position that § 7907(a) merely emphasizes that a State's decision to participate in NCLB is entirely voluntary. In other words, she contends that when Representatives and Senators stated that these various statutes would not become "unfunded mandates," they meant that, because States remained free not to accept federal funding under these statutes, nothing in them was mandated. This is also a colorable view of the debates (though perhaps with some exceptions, *see, e.g.*, 139 Cong. Rec. H7769-70 (Rep. Condit) (stating that it was not Congress's intent to require States to choose among "tak[ing] the requirement seriously and end[ing] up with a multi-million-dollar unfunded Federal mandate . . . or refus[ing] to participate in the program.")).[6]

Thus, this legislative history, to the extent it informs a reading of NCLB, is at best unclear regarding the fundamental dispute regarding § 7907(a). Indeed, to the extent it supports either

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[6] As noted earlier, little, if any, of the debates involved a concern about federal officials imposing unauthorized requirements on the States—the basis of the district court's rogue-officer interpretation that the Secretary also advances.

party, it bolsters Plaintiffs' interpretation.[7] Accordingly, it adds no more clarity of notice to the States regarding their obligations to comply with NCLB funding requirements than the text itself.

d. *The Former Secretary Expressed Plaintiffs' Interpretation of the Text*

We have concluded that a state official would not be on clear notice that her State, once it opts into NCLB, would be required to comply with NCLB requirements that are not paid for under the Act. We note here that even the Defendant's former views on this topic suggest that this conclusion is proper. As Plaintiffs explain, former Secretary of Education Rod Paige (since succeeded by current Secretary Margaret Spellings) stated that the Act "contains language that says *things that are not funded are not required*."

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[7] The dissent states that because "there was no discussion of changing the historic funding scheme of our nation's educational system, from largely state funds to federal funds," the legislative history does not support the Plaintiffs' argument. Dissenting Op. at 28. However, the Plaintiffs' interpretation of the Act does not require, or even suggest, that such a change was intended in the Act. Rather, the Plaintiffs' reading of the Act and their arguments before this Court request recognition that when acts of the Legislature are implemented pursuant to the spending power, the Legislature cannot impose a condition on federal funds that requires States to spend their own funds absent a clear statement that such a condition has been placed on the funds.

The dissent's further accusation that this opinion's holding is "contrary to the way our nation's education has been operated and funded for centuries" reads the majority opinion much too broadly. *See* Dissenting Op. at 19. We hold only that the Spending Clause requires a more clear statement from Congress before States and local educational agencies can be required to expend their own funds in order to comply with federal guidelines.

(JA 20 (quoting Paige statement of Sept. 4, 2003) (emphasis added).) Reiterating this point in a later speech, Paige reassured that "if it's not funded, it's not required. There is language in the bill that *prohibits requiring anything that is not paid for*." (JA 21 (quoting Paige statement of Dec. 2, 2003) (emphasis added).)

The Secretary does not dispute that her predecessor made these statements; she explained at oral argument that they were "stray comments." Stray or not, the comments leave us to wonder how a state official would be on clear notice that her State would have to comply with obligations under the Act that are not funded when the Secretary of Education cited to appropriate text in the Act itself to assure States that there is no such requirement. It comes as no surprise that many state officials do not have this understanding in light of § 7907(a). *See, e.g.*, Wisc. Atty. Gen. Ltr. Op. at 4 (May 12, 2004) ("The language in 20 U.S.C. § 7907(a) . . . seems to bear only one reasonable interpretation: federal agencies and officials lack authority to require any State, or State subdivision, to take any action under the ESEA [which NCLB amended] that is not fully funded by federal monies.") (*available at* http://www.nsba.org/site/docs/33800/33758.pdf) (last visited Dec. 28, 2007); Nat'l Conf. of State Legislators Mem. (July 7, 2003) (noting, in a memorandum to State legislative presiding officers, chairs of education committees, and legislative education staff, that "[u]nder the basic rules of statutory construction, *the plain meaning of the statutory language [of § 7907(a)] is fairly clear-states, or local subdivisions, do not have to spend funds on the costs of the NCLB that are not paid for by the Act itself.*") (*available at* www.ncsl.org/statefed/nclblegal.htm) (last visited Dec. 28, 2007); 46 Conn.

S. Proc. pt. 9, 2003 Sess. 2626, 2632 (May 21, 2003) (statements of Sen. Sullivan) (noting that Connecticut can "only pray that that one magic phrase [in] Leave No Child Behind [sic] that says if the feds don't fund it, we don't have to do it, turns out to be real," because "if the money ain't there folks, we can't do it."); 16 V.S.A. § 165 (2003) ("[C]onsistent with [§ 7907] of the No Child Left Behind Act, neither the state nor any subdivision thereof shall be required to spend any funds or incur any costs not paid for under the Act in order to comply with the provisions of the Act."). To be sure, state officials may have their own interests in reading § 7907(a) to excuse their States' obligations to comply with unfunded requirements of NCLB; our point is merely that NCLB does not provide clear notice that their interpretation (and, apparently, the former Secretary's) is somehow misplaced.

III. CONCLUSION

The No Child Left Behind Act rests on the most laudable of goals: to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301. Nobody challenges that aim. But a state official deciding to participate in NCLB could reasonably read § 7907(a) to mean that her State need not comply with requirements that are "not paid for under the Act" through federal funds. Thus, Congress has not "spoke[n] so clearly that we can fairly say that the State[s] could make an informed choice" to participate in the Act with the knowledge that they would have to comply with the Act's requirements regardless of federal funding. *See Pennhurst*, 451 U.S. at 25. Of course, if that ultimately is what Congress intended, the ball is properly left in its court to make that clear. *See Arlington*, 126 S. Ct. at 2465

(Ginsburg, J., concurring) ("The ball, I conclude, is properly left in Congress' court to provide, if it so elects, for consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize, along with any specifications, conditions, or limitations geared to those fees and expenses Congress may deem appropriate.") (footnote omitted). Accordingly, we REVERSE the district court's judgment dismissing Plaintiffs' complaint and REMAND for further proceedings consistent with this opinion.

DISSENT

McKEAGUE, Circuit Judge, dissenting. Imagine the following: there is a service with which State and local governments have historically provided its citizens. The governments finance the service through taxes. Local provision, local financing, local control. But now, imagine that the federal government comes along and offers a deal associated with that service. The deal comes with both a carrot (more money) and a stick (more duties). A reading of the offer sheet confirms what could be expected: the duties are mandatory if they choose to participate, but the money, well, like all money from the federal government, is subject to change from year-to-year. But, the reading also confirms that the offer can be accepted in one period and dropped the next, so the risks are not open-ended. The State and local officials are thus faced with a choice: accept the money and assume the duties, or forgo both and go it alone with less money but fewer duties.

There is, of course, really no need to imagine such a world-what I have described is not the Emerald City in the Land of Oz but rather this country's primary and secondary education system. But rather than wearing green-tinted glasses, I submit that the inhabitants of this system—State and local school officials—had a crystal clear vision of what Congress was offering them by way of the No Child Left Behind Act of 2001 (the "NCLB"). Many of them could not bring themselves to pass up the federal funds, but simply hoped that someone or something would save them at the end of the road. Today the majority does exactly that.

While the federal government historically has always contributed a relatively small amount to the

total funding of local education, increasingly it has become concerned about the decline in the quality of children's education, particularly with respect to the nation's most at-risk children. In an attempt to achieve more accountability in local education, Congress passed the NCLB, which revised the earlier Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941). Although participation in the NCLB is voluntary, Congress imposed significant educational reforms for those states that elect to participate and receive federal funds. Today the majority holds, in an opinion contrary to the way our nation's education has been operated and funded for centuries, that Congress could have intended that the federal government now fund the entire cost of various educational reforms for our nation's children. Because there is no support in the text or context of the NCLB for the proposition that Congress intended such a monumental and unprecedented change in our nation's education funding, I respectfully dissent.

I

Regardless of whether federal funds defray the entire cost of compliance, participating States and school districts must comply with the NCLB's educational requirements. Contrary to the majority's conclusion, § 7907(a) does not render the NCLB ambiguous; thus, Congress did not exceed its authority under the Spending Clause. By creating ambiguity where none exists, the majority largely avoids Plaintiffs' principal argument on appeal, although it does allude in passing to its inherent weakness. *See* Maj. op. at 11 ("Indeed, perhaps the Secretary's view of the text [of § 7907(a)] is ultimately

correct."). As I find no ambiguity, I must first address Plaintiffs' principal argument.

Plaintiffs contend that a plain reading of 20 U.S.C. § 7907(a) leads to the conclusion that notwithstanding States' acceptance of federal funds intended to defray a portion of the cost of local education, States and local school districts need not comply with the educational requirements set forth in the NCLB if they deem federal funding to be insufficient to cover the entire cost of compliance. Section 7907(a) states in relevant part: "Nothing in this Chapter shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Chapter." Plaintiffs argue that § 7907(a) means that the "NCLB cannot be implemented in a manner that requires states and school districts 'to spend any funds or incur any costs not paid for under th[e NCLB].'" Appellants' Br. at 28-29 (quoting 20 U.S.C. § 7907(a)) (alteration in original). As explained below, the text, operation, and structure of the NCLB undermine Plaintiffs' reading. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 666-67 (1985) ("[T]he background of the actual operation of Title I" informs a proper understanding of "the fundamental nature of the obligations assumed under Title I."). Instead, § 7907(a) is properly read to mean that federal officers who are charged with implementing and administering the NCLB cannot transform the statutory scheme from a voluntary program to a mandatory one. Plaintiffs' interpretation has the absurd effect of eviscerating with a single provision the entire comprehensive scheme of accountability requirements and financial disbursements set forth in hundreds of pages of statutory text. Without a stronger showing that Congress actually intended

that result, I decline to adopt such an untenable interpretation.

A. NCLB Educational Requirements

The NCLB expressly outlines participating States' and school districts' obligations to meet various educational requirements. If a State accepts money under a particular part of the NCLB, it must comply with that part's requirements. 20 U.S.C. § 6311(a)(1); *see also id.* §§ 6363(a)(1), 6396(a)(1), 6842(a)(1). Conversely, if a State does not seek any funding under the NCLB, it need not comply with any of the NCLB's requirements.

School districts within a participating State face a more complicated set of obligations. Most of the NCLB's funds are allocated to school districts based on the number of qualifying students in the school (*e.g.*, low-income students, migrant students, etc.). School districts without at-risk students will not receive any funding under particular parts of the NCLB and therefore will not be required to comply with some of the NCLB's requirements.

Yet, districts without at-risk students are not completely off the regulatory hook. Some requirements under Title I, Part A apply across an entire participating State, rather than just to those "local educational agenc[ies]" (*i.e.*, school districts) that receive federal funds. For example, a participating State must create statewide academic standards and *all* school districts in the state must test their public-school students under those standards. *Id.* § 6311 (b)(1)(B), (3)(A). The broad reach of § 6311 is made clear by the limited exception for school districts that do not receive federal funds: they need not publish the results of student testing or take certain steps if a

school fails to make AYP. *Id.* §§ 6311(b)(2)(A)(ii), 6316. Pointedly, Congress *did not* tell non-funded school districts that they need not perform any testing in the first instance.

This example highlights the central defect in Plaintiffs' argument. Congress intended, as expressed in the text of the NCLB, that a participating State raise standards of student education across the entire state, regardless of whether one well-off pocket of the state does not receive any federal funds. In those districts that do receive federal funds, Congress simply requires even more. When Congress expressly applies certain requirements to all school districts irrespective of funding, that is a clear indication that it did not intend to tie the cost of complying with the NCLB's requirements to the amount of federal funding, which is inherently subject to change based on the spending priorities of each particular Congress and its competing demands for increasingly scarce federal dollars.

B. NCLB Funding Scheme

Plaintiffs argue that the NCLB's educational requirements are enforceable only when the federal government defrays the entire cost of compliance. The funding structure of the NCLB dictates otherwise. Most telling is that there is no mention of the cost of compliance anywhere in the text of the NCLB, let alone any promise of relief if federal funding is insufficient to defray the entire cost of compliance. The NCLB's silence as to the cost of compliance or to any explicit relief therefrom if federal dollars fall short is particularly conspicuous here insofar as Congress, in structuring the NCLB, was well aware that our nation's education system is historically funded largely by State, not federal dollars. *Cf.*

Bennett v. New Jersey, 470 U.S. 632, 635 (1985) (explaining that Title I was enacted by Congress with "[r]espect[] [for] the deeply rooted tradition of state and local control over education").

The NCLB's funds are distributed to schools and school districts based on the types of students in those schools and districts, not on costs. Under Title I, Part A, for each student from a low-income family or in institutional care, a school district is "eligible to receive . . . 40 percent of the average per-pupil expenditure in the State." 20 U.S.C. § 6333(a)(1)(B). Schools with more low-income students will receive more Title I, Part A funding than schools with fewer low-income students, and schools with no low-income students will receive no funds under the main grant in Title I, Part A. *See id.* § 6333(c)(2).

In most cases, schools that receive federal funding must spend the funds only on the specific students who count toward the amount of funding the school receives (low-income, migrant, etc.), not the entire student-body in general. For example, only where at least 40% of a school's students are low-income can the school use federal funds "to upgrade the entire educational program of a school." *Id.* § 6314(a)(1). For schools with less than 40% low-income students, the federal funds must be spent only on those low-income students. *See id.* Nevertheless, the latter schools must still meet all of the NCLB's requirements, regardless of federal spending on each particular student.

Other features of the NCLB's scheme undercut Plaintiffs' position. Congress capped the aggregate funds authorized under the NCLB without any provision for the actual costs of compliance. *Id.* § 6302(a). The NCLB also expressly provides for the possibility

that funds available in a given year might be insufficient to pay all school districts the amounts they are *eligible* to receive: "If the sums available . . . are insufficient to pay the full amounts that all [school districts] are eligible to receive . . . , the Secretary shall ratably reduce" each school district's funding. *Id.* § 6332(b)(1). At no time have the amounts school districts are *eligible* to receive come even close to equaling the cost of compliance. Similar provisions appear in the programs for high-quality teachers and migrant children. *See, e.g., id.* § 6393(c)(1)(A). Yet, there is no provision that excuses a school district's compliance with the NCLB's requirements in the face of a shortfall in the amounts school districts are eligible to receive, let alone the total cost of compliance.

This overview of the NCLB's funding structure highlights another important point. It simply defies commonsense to suggest that Congress intended to relieve States and school districts from compliance with the NCLB's requirements when the cost of compliance—which Congress does not control—exceeds appropriations, but not when the amounts appropriated—over which Congress has total control—fall below the amounts school districts are eligible to receive.

Plaintiffs argue that the fact that Congress has elected not to appropriate all the funding it is authorized to appropriate under Title I, Part A supports their position that the NCLB is underfunded. This actually shows just the opposite. Neither Title I, Part A nor any other part of the NCLB authorizes *any* appropriations beyond 2006-2007. *See, e.g.*, 20 U.S.C. §§ 6302(a), 6553, 6603(a), 6663, 6801(a), 7103. Continued NCLB funding will require reauthoriza-

tion of appropriations by Congress each year after 2006-2007. Yet, at the same time that it authorized funds only through 2006-2007, Congress applied the NCLB's educational requirements through 2013-2014. *See id.* § 6311(b)(2)(F); 34 C.F.R. § 200.15. Again, this demonstrates a fundamental and important disconnect between appropriations and requirements.

More importantly, Plaintiffs ignore the undisputable fact that even if Congress had "fully funded" the NCLB each year (*i.e.*, annually appropriated the entire amount authorized), the funds would still have fallen far short of the total purported costs of compliance. This can be seen by comparing the disparity between actual appropriations and purported compliance costs versus the disparity between authorizations and actual appropriations. According to Plaintiffs' complaint, federal funding in Ohio covers less than 16% of costs for test development and administration. In Illinois, federal funding under Title I, Part A covers less than 33% of costs to achieve current AYP rates. In Vermont, Title I, Part A funding covers only 19% of current costs to achieve AYP. In the Jordan, Utah and Reading, Pennsylvania school districts, respectively, federal funding covers only 27% and 31% of the cost of AYP attainment. By contrast, actual appropriations have been somewhat greater than 66% of the authorized amount for the periods 2001-2002 through 2004-2005; for 2005-2006, slightly less.[1] Thus, even though Congress has

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[1] Congress's actual appropriations and the appropriations authorized in Title I, Part A are, respectively: $10.35 billion and $13.5 billion for 2001-2002; $11.69 billion and $16 billion for 2002-2003; $12.34 billion and $18.5 billion for 2003-2004; $12.74 billion and $20.5 billion for 2004-2005; and $13.34 billion and $22.75 billion for 2005-2006. 20 U.S.C. § 6302(a); Complaint at 18.

routinely appropriated more than half the amounts authorized each year, the funds have, according to Plaintiffs, only covered about a third of the costs of compliance. In other words, the maximum amount of money from Congress would still have left the districts short. Congress's annual decisions not to appropriate up to the level authorized just confirms that it never intended to cover the entire costs of compliance in the first place.

Plaintiffs' interpretation of the NCLB not only disregards its overall statutory scheme, but it also defies reason and history. The overwhelming burden of funding education in this country is and always has been borne by State and local governments. Even with the NCLB, the federal government provides only 7% of the total funding for local education. 147 Cong. Rec. S13365, 13373 (2001) (statement of Sen. Feinstein). The notion that Congress intended to pay in full for a testing and reporting regime of indeterminate cost, designed and implemented by States and school districts, not federal agencies, is not only nonsensical and fiscally irresponsible, but also contravenes the traditional recognition of State and local governments' primary responsibility for public education. In short, there is nothing in the NCLB that suggests Congress intended to federalize some or all of State and local education.

II

A. Text and Context of § 7907(a)

Alternatively, Plaintiffs argue that, even if § 7907(a) does not have the meaning they suggest, it creates an ambiguous condition on the receipt of federal funds, in violation of the so-called clear-

statement rule.[2] Under that rule, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The majority agrees, concluding that "a state official who is engaged in the process of deciding whether the State should accept NCLB funds and the obligations that go with those funds" would not understand that if the State "chooses to participate, [it] will have to pay for whatever additional costs of implementing the Act are not covered by the federal funding provided under the Act." Maj. op. at 11. To the contrary—any reasonable State official, reading the NCLB with a clear eye, would understand that there was no guarantee that federal funds would match all of the costs controlled and incurred by States and local school districts. *See Bennett*, 470 U.S. at 666 ("The requisite clarity in this case is provided by Title I; States that chose to participate in the program agreed to abide by the requirements of Title I as a condition for receiving funds.").

My statutory analysis consists of two elements: text and context. Beginning with the text of § 7907(a), I, like the majority, focus on the term "mandate," but, unlike the majority, I find that its

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[2] The clear-statement rule is one of several general restrictions on congressional authority under the Spending Clause. In addition to clearly articulating the condition on federal funds, the congressional action must be in pursuit of the general welfare; the conditions must be related to the federal interest being pursued; the financial incentives must not amount to coercion; and the conditions must comport with other constitutional provisions. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987); *Cutter v. Wilkinson*, 423 F.3d 579, 584-85 (6th Cir. 2005). Plaintiffs do not argue that the NCLB fails to satisfy these other restrictions.

meaning is unambiguous. As the Supreme Court has explained, "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911)) (alteration in original) (internal quotations omitted).

In 1995, Congress enacted the Unfunded Mandates Reform Act of 1995 ("UMA"), which provides the following definition:

> (5) Federal intergovernmental mandate. The term "Federal intergovernmental mandate" means—
>
> (A) any provision in legislation, statute, or regulation that—
>
> (I) would impose an enforceable duty upon State, local, or tribal governments, except—
>
> (I) a condition of Federal assistance; or
>
> (II) a duty arising from participation in a voluntary Federal program . . . .

2 U.S.C. § 658(5)(A) (emphasis added). Applying the UMA definition of mandate from § 658(5)(A), the § 7907(a) provision at issue means that a State is free to decide whether or not to participate in the NCLB, with its funding as well as its educational requirements; and, a State can forgo participation in the NCLB if it decides that such participation is not beneficial to its educational system. However, if a State chooses to participate, it must take all of the "bad"—the federal requirements—with the "good"—the federal money. This interpretation is consistent with the NCLB's educational requirements, funding provisions, and overall statutory scheme and avoids sweeping aside the main provisions of the scheme.

The majority points out that the UMA also provides a second definition of mandate, according to which "the term 'Federal mandate' means any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." 2 U.S.C. § 1555; Maj. op. at 14. However, this broader definition of mandate applies only to the collection of information, and not to the measures actually designed to limit mandates by Congress and federal agencies. Specifically, § 1555 applies only to provisions of the UMA which require that "the Advisory Commission on Intergovernmental Relations . . . shall complete a study to examine the measurement and definition issues involved in calculating the total costs and benefits to State, local, and tribal governments of compliance with Federal law." 2 U.S.C. § 1551(a). The primary definition found at § 658(5)(A) applies instead to all provisions designed "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities." *Id.* § 1501(2). The text of § 7907(a), and Plaintiffs' arguments based on § 7907(a), are consistent with the purpose to which the definition in § 658(5)(A) applies: namely, to prevent Congress from compelling the expenditure of State funds. Both in § 658(5)(A) of the UMA, and in § 7907(a) of the NCLB, as I believe it properly understood, Congress indicated that it was not concerned with preventing the expenditure of State funds when States are able to avoid the

expenditure by ceasing their "participation in a voluntary Federal program." 2 U.S.C. § 658(5)(A)(i)(II).

The majority also relies on a provision of the Perkins Vocational Education Act ("Perkins Act") to argue that § 7907(a) promises that States can receive funding under the NCLB but can also refuse to comply with its requirements to the extent that the cost of compliance exceeds the amount of federal funds. Maj. op. at 13-14. As the majority notes, the relevant provision of the Perkins Act reads, as does § 7907(a), that "[n]othing in this Chapter shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Chapter," but the Perkins Act also adds, "except as required under [20 U.S.C. §§ 2322(b), 2391(b), and 2413]." 20 U.S.C. § 2306a(a). In light of the different statutory schemes, however, this distinction makes sense.

The respective funding structures of the Perkins Act and the NCLB suggest that, even if Congress intended to fully fund the Perkins Act, the same cannot be said for the NCLB. The Perkins Act allots funds to States based on the number of residents of the state in particular age groups, with the greatest amount of funding allotted based on the portion of the population between ages fifteen and nineteen, followed respectively by the population between twenty and twenty-four, and between twenty-five and sixty-five. *Id.* § 2321(a)(2). This reflects the Perkins Act's purpose which is a general, statewide one: to "develop more fully the academic and career and technical skills of secondary education students and postsecondary education students who elect to enroll in career and technical education programs." *Id.*

§ 2301. Needless to say, all States have significant numbers of residents within these age categories.

By contrast, the purpose of the NCLB is to "meet[] the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance." *Id.* § 6301(2). It is specifically targeted to reach the poor and disadvantaged, and funding under Title I, Part A is consequently available to States and school districts only if, and insofar as, they have low-income students or students in one of the other mentioned categories. *Id.* § 6333(c)(2). Nonetheless, the educational requirements of Title I, Part A specifically apply to all participating schools and school districts, not only to those students for whom the school districts will receive federal funding. *See id.* § 6311(b)(1)(B).

Indeed, the NCLB's funding scheme suggests that there is no correlation between the amount of federal funds a State or school district will receive and the cost of compliance with its educational requirements. In light of the different relationship between requirements and funding in the Perkins Act and the NCLB, it is unreasonable for the majority to rely on the Perkins Act to interpret § 7907(a).

In statutory analysis, context also matters. In determining whether the clear-statement rule is satisfied, a court must not let itself focus myopically on one phrase or provision. *Pennhurst*, 451 U.S. at 18 (cautioning courts against "be[ing] guided by a single sentence or member of a sentence"). Rather, in addition to the "plain language" of the provision, *id.* at 23, the court must also consider the general and

specific purposes and objectives of the legislation and the policies being pursued, *id.* at 18. The court must further "look to the provisions of the whole law." *Id.* at 18 (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)). Specifically, the court must not divorce one section from the remaining provisions in the statute, but rather read the entire statute as a whole:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed.2d 462 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed.2d 891 (1989). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S. Ct. 1061, 131 L. Ed.2d 1 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S. Ct. 818, 3 L. Ed.2d 893 (1959).

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

Here, if the language in § 7907(a) that "[n]othing in this Chapter shall be construed to . . . mandate a State or any subdivision thereof to spend any funds

or incur any costs not paid for under this Chapter" meant what Plaintiffs suggest, § 7907(a) would contradict the NCLB's other requirements that States and schools districts maintain fiscal efforts to fund schools that receive the NCLB funds as well as those that do not. In particular, the NCLB requires that a school district "may receive funds under [Title I, Part A] only if State and local funds will be used in schools served under this part to provide services that, taken as a whole, are at least comparable to services in schools that are not receiving funds under this part," 20 U.S.C. § 6321(c)(1)(A); that "either the combined fiscal effort per student or the aggregate expenditures of the agency and the State with respect to the provision of free public education by the agency" must not be "less than 90 percent of the combined fiscal effort or aggregate expenditures" for the preceding year, *id.* § 7901(a); and that States and school districts "shall use Federal funds received under [Title I, Part A] only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under [Title I, Part A], and not to supplant such funds," *id.* § 6321(b)(1).

Plaintiffs' interpretation of Section 7907(a) eviscerates States' and school districts' obligations under § 6321(b)(1), § 63 21 (c)(1)(A), and § 7901(a). Alternatively, if "mandate" is read with the meaning I have suggested above, § 7907(a) does not contradict other provisions of the NCLB, nor does it cause the unreasonable results created by Plaintiffs' interpretation. *See Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942) (stating "[w]e should, of course, read . . . two sections [of a single statute] as consistent rather than conflicting, if that be possible"); *see also Bennett*

v. Spear, 520 U.S. 154, 173 (1997) (stating a "cardinal principle . . . is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section").

B. *Pennhurst* and *Arlington*

To reach its conclusion that the NCLB did not provide clear notice to the States regarding their obligation to incur additional costs to comply with the NCLB's requirements, the majority also relies on the Supreme Court's decisions in *Pennhurst* and *Arlington*. As for the legal holdings of those two decisions, neither supports the majority. This court has interpreted the *Pennhurst* holding (which *Arlington* applies) as requiring "[n]othing more" than "'clear notice' to the states that funding is conditioned upon compliance with certain standards." *Cutter*, 423 F.3d at 586 (citing *Pennhurst*, 451 U.S. at 25). As explained *supra*, the NCLB met that standard of notice. As for the factual circumstances in those two cases, neither is particularly helpful here.

In *Pennhurst*, the plaintiffs claimed that States receiving federal funding under the former version of the Developmentally Disabled Assistance and Bill of Rights Act affirmatively were required to provide the rights which the statute's "Bill of Rights" provision described as "'the rights of persons with developmental disabilities.'" *Pennhurst*, 451 U.S. at 13 (quoting Act of Oct. 4, 1975, § 111, 89 Stat. 486, 502 (1975) (provision repealed 1984)). These included "'a right to appropriate treatment, services, and habilitation for such disabilities . . . in the setting that is least restrictive of the person's personal liberty.'" *Id.* (quoting Act, § 111(1), (2), 89 Stat. at 502).

The *Pennhurst* Court held that the statute's Bill of Rights "represent[s] general statements of federal policy, not newly created legal duties." *Id.* at 23. The Court noted that the act's Bill of Rights was introduced as a set of congressional "findings respecting the rights of persons with developmental disabilities." *Id.* at 13 (quoting Act, § 111, 89 Stat. at 502). It also pointed out that other portions of the statute, unlike the Bill of Rights provision, contained language that expressly conditioned the receipt of federal funds on compliance. *Id.* at 23. By contrast, the Bill of Rights section provides that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . *should* be provided in the setting that is least restrictive." *Id.* at 13 (quoting Act, § 111(2), 89 Stat. at 502) (emphasis added). The Court also noted that the statute did not empower the Department of Health and Human Services to withhold funds for failure to comply with the Bill of Rights, as it did for failure to comply with other portions of the statute. *Id.* at 23.

Pennhurst is not controlling because none of the Court's bases for finding the Bill of Rights provision to be "hortatory, not mandatory" are present here. The requirements of Title I, Part A are set forth in imperative, not hortatory language. *Compare* 20 U.S.C. § 6316 ("Each local educational agency receiving funds under [Title I, Part A] shall . . . .") *with* 89 Stat. at 502 ("treatment . . . should be provided"). The NCLB's educational requirements are not introduced as mere congressional findings or voluntary goals, as was largely the case prior to the NCLB. Here, the Secretary of Education is statutorily empowered to withhold funding from States that refuse to comply with the NCLB's educational requirements. 20 U.S.C. § 6311(g)(2) (applying to the

requirement to create state standards and testing instruments); *id.* §§ 1234c, 1221(c)(1) (applying to all of the NCLB).

Moreover, the holding of the Supreme Court in *Pennhurst* was *not* that the duties created by the statute were too ambiguous to be preconditions for the receipt of federal funds, but that they were not requirements on the states at all. The Court explained in dicta that its conclusion was simply "buttressed by the rule of statutory construction . . . that Congress must express clearly its intent to impose conditions on the grant of federal funds." *Pennhurst*, 451 U.S. at 24. For all of these reasons, *Pennhurst* is factually distinguishable from the present case.

In *Arlington Central School District Board of Education v. Murphy*, the Supreme Court recently held that the Individuals with Disabilities in Education Act ("IDEA") does not require school districts to pay the expert witness fees incurred by parents who sue the school district to enforce compliance with the statute. 126 S. Ct. 2455, 2458 (2006). The Court reiterated that "'courts must presume that a legislature says in a statute what it means and means in a statute what it says there,'" and held that the IDEA provision that the court may award prevailing parents "'reasonable attorneys' fees as part of the costs' . . . does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." *Id.* at 2459 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); 20 U.S.C. § 1415(i)(3)(B)).

Like *Pennhurst*, *Arlington* is not controlling here. Title I, Part A does not merely hint that acceptance of the NCLB's funds makes States and school districts

responsible to fulfill the statute's educational requirements: it says so explicitly. None of the NCLB's educational requirements suggest, let alone state, that compliance is contingent on full federal funding. Moreover, States and school districts were aware that the NCLB's educational requirements applied even without federal funding to pay for them, because funds under Title I, Part A are available only in proportion to the number of low-income students in a school. "There was no ambiguity with respect to th[e] condition[s]" upon which States and school districts received federal funds under the NCLB and enforcing the statute's requirements does not violate the Spending Clause. *Bennett*, 470 U.S. at 666.

Unlike in *Pennhurst* and *Arlington*, we are faced with a sufficiently clear statutory text which sets forth compulsory requirements on participating States and school districts, not merely goals or statements of intent. While the NCLB is long and, at times, complex, such length and complexity does not render it ambiguous as to whether Congress meant to impose a condition on the grant of federal money.

C. Legislative History

Finally, Plaintiffs argue that the legislative history of § 7907(a) supports their interpretation of the provision, or at least indicates that the NCLB is ambiguous for Spending-Clause purposes. The majority concludes that the legislative history supports the latter contention, that § 7907(a) renders the NCLB ambiguous. I disagree.

Initially, and most importantly, there is no need to look at the legislative history of the NCLB. Courts may "resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc*

Ltd., LLC v. United States, 541 U.S. 176, 187 n.8 (2004). It is not appropriate to use legislative history to "render[] what is plain ambiguous." *Zedner v. United States*, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring). As explained above, no ambiguity exists in § 7907(a), especially when considered as part of the larger statutory scheme of the NCLB.

Even if it were appropriate to look to the legislative history, we should be focusing on the specific history of the NCLB. As the majority notes, § 7907(a) was first adopted as a provision of the 1994 reauthorization of the ESEA, also known as "Goals 2000." Maj. op. at 15-16; *see* Improving America's Schools Act of 1994, § 14512, 108 Stat. 3518, 3906 (originally codified at 20 U.S.C. § 8902). However, Goals 2000 was significantly different from the NCLB. As the Secretary aptly summarizes, "Goals 2000 set national goals for education improvement and provided funds to the States to aid them in developing state standards for improving education," but "these standards were intended to be voluntary." Appellee's Br. at 23-24. Unlike Goals 2000, the NCLB created compulsory educational requirements and serious consequences for failure to comply with its requirements for States that willfully volunteer to participate; in short, it is an entirely different statute. In situations like this, the Supreme Court has often cautioned against relying on the legislative history of one statute in interpreting another. *See, e.g., Doe v. Chao*, 540 U. S. 614, 626-27 (2004) ("Those of us who look to legislative history have been wary about expecting to find reliable interpretive help outside the record of the statute being construed."); *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U. S. 297, 320 n.29 (1983) ("Although the term 'maritime' occurs both in 28 U.S.C. § 1333(1)

and in § 2(3) of the Act, these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.'") (quoting *Boudreaux v. Am. Workover, Inc.*, 680 F.2d 1034, 1050 (5th Cir. 1982)); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 n. 21 (1982) (criticizing the dissent for "us[ing] the legislative history-of a different statute-to rewrite Title IX so as to restrict its reach").

A review of some of the legislators' comments about the proposed NCLB (not Goals 2000, not the Perkins Act) confirms that Congress did not intend for § 7907(a) to protect participating States from having to spend their own funds to comply with the NCLB's educational requirements. Senator Leahy noted that "the funds are far less than what will be necessary, leaving Vermont and other states with large financial gaps to fill." 147 Cong. Rec. S13365, 13378 (2001). Senator Wellstone asked, "Where are the resources to make sure that all the children in America have the same chance to do well? . . . Not in this bill. When you start talking about we have increased funding for title I, no, not in real dollar terms." *Id.* at 13368. Senator Feinstein defended the bill, but expressed the same understanding of its funding structure, explaining, "The Federal Government provides only 7 percent of total education funding, but the strength of this bill is that it tries to leverage the Federal share to prod States and school districts to make schools responsible for real results." *Id.* at 13373.[3]

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[3] It should be noted that Senator Kennedy stated, "In this legislation we are committing with a trigger that says, if the resources are not there, these provisions do not apply." 147 Cong. Rec. S13365, 13372 (2001). However, it is not clear, even in the context of his full remarks, to what he was referring.

The bill's opponents in the House expressed similar concerns to those voiced in the Senate. *See* 147 Cong. Rec. H2396, 2403-04 (2001). Significantly, there was no discussion of changing the historic funding scheme of our nation's educational system, from largely State funds to federal funds. Thus, assuming arguendo that the NCLB's legislative history is even relevant in this case, it lends little or no support to Plaintiffs' argument.

III

In conclusion, let's consider the road that Plaintiffs want to take us down. A State decides to accept NCLB funding. State and local school officials design and implement the education programs required under the NCLB. They decide how federal dollars are to be allocated between various programs. They also apparently get to determine whether one of their education programs is "fully funded" with federal dollars. So, consistent with Plaintiffs' reasoning, if they find their students failing in one program, rather than redoubling their efforts, trying something different, or asking the State or local citizenry for more funding, they can simply divert federal funds *away* from the program, declare the program "under funded," and wipe their hands (but not pay back the federal dollars). Voila, problem solved, at least for the State and local officials, if not for the struggling students.

This, of course, is exactly the *opposite* of what Congress intended to accomplish with the NCLB. 20 U.S.C. § 6301(4) (stating that one purpose of the NCLB is "holding schools, [school districts], and States accountable for improving the academic achievement of all students"). No green-tinted glasses can alter this fact.

To its credit, the majority does not accept outright Plaintiffs' interpretation of the NCLB. Yet, in finding § 7907(a) ambiguous, it concludes that Congress might have meant what Plaintiffs' say it did. I cannot agree.

Contrary to the majority's opinion, I would hold that the NCLB's requirements apply to participating States and the schools and school districts within those states, regardless of whether federal funding is sufficient to defray the entire cost of compliance. I would further hold that States' and school districts' obligations are consistent with § 7907(a), which simply prevents federal officers from transforming the NCLB from a voluntary program into a mandatory one.

My reading of § 7907(a) is supported by the plain text of the NCLB as well as its overall structure. Under the NCLB, participating States and the school districts within them must comply with extensive educational requirements if the States choose to accept federal funding. The NCLB's funding amount for a school district is dependent on congressional appropriation decisions and the proportion of at-risk students in the school district, *not* on the cost of compliance with the NCLB's educational requirements. My reading also recognizes State and local governments' long-standing responsibility for largely administrating and funding our children's education, and it properly charges Congress and State officials with knowledge of that fact. Because the NCLB's requirements are sufficiently clear, I would hold that requiring compliance with them is an appropriate exercise of congressional authority under the Spending Clause.

For all of these reasons, I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 05/01/2008]

No. 05-2708

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Plaintiff-Appellant,

v.

SECRETARY OF U.S. DEPARTMENT OF EDUCATION,
Defendant-Appellee.

BEFORE: BOGGS, *Chief Judge*; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, *Circuit Judges.*

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN
CLERK

TELEPHONE
(513) 564-7000

540 Potter Stewart U.S. Courthouse Building
CINCINNATI, OHIO 45202-3988

January 20, 2009

SENT VIA E-MAIL

Counsel of Record

Re: No. 05-2708
Pontiac School District v. Secretary, U.S. Department of Education

Dear Counsel:

The court has asked that you file supplemental briefs in the appeal noted above, addressing the following questions:

1. Are these claims justiciable—specifically, are they ripe for review, see *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)—have plaintiffs exhausted all administrative remedies, *see Thunder Basin Coal* Co. *v. Reich*, 510 U.S. 200 (1994), and can the court properly resolve this case without the presence of the relevant States (Michigan, Texas, and Vermont) as parties or at least without knowing the views of the States on the issues presented?

2. 20 U.S.C. § 6575, "Prohibition against Federal mandates, direction, or control," as contained in Title I, Part I of the No Child Left Behind Act of 2001, shares language similar to

that found in the first part of 20 U.S.C. § 7907(a), "Prohibitions on Federal government and use of Federal funds," but lacks language similar to that found in the second part of § 7907(a), the so-called " unfunded mandate provision (". . . or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this [Act]." Address what effect—if any— § 6575 has on § 7907(a).

Your supplemental briefs are not to exceed 20 pages, and are to be filed with this office not later than February 10, 2009. You may e-mail the briefs to Mr. Roy Ford of this office at roy_ford@ca6.us courts.gov, or you may fax them to him at (513) 564-7097.

Thanking you for your attention to this request, I am

Very truly yours,

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-2708

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Plaintiffs-Appellants,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF EDUCATION,
Defendant-Appellee.

Decided and Filed: October 16, 2009

Before: BATCHELDER, *Chief Judge*; MARTIN, BOGGS, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, *Circuit Judges*.

ORDER

This case was heard by the *en banc* court on December 10, 2008. The court, for the reasons more fully set forth in the opinions issued herewith, divided evenly, with eight judges voting to affirm the judgment of the district court and eight voting to reverse that judgment. Consequently, the judgment of the district court is AFFIRMED. *See Goodwin v. Ghee*,

330 F.3d 446 (6th Cir. 2003), and *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996).

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-2708

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Plaintiffs-Appellants,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF EDUCATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-71535—Bernard A. Friedman, District Judge.

Argued: December 10, 2008
Decided and Filed: October 16, 2009

Before: BATCHELDER, *Chief Judge*; MARTIN, BOGGS, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, *Circuit Judges*.

COUNSEL

ARGUED: Robert H. Chanin, BREDHOFF & KAISER, P.L.L.C., Washington, D.C., for Appellants. Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON

BRIEF: Robert H. Chanin, Jeremiah A. Collins, BREDHOFF & KAISER, P.L.L.C., Washington, D.C., Dennis R. Pollard, THRUM LAW FIRM, P.C., Bloomfield Hills, Michigan, Alice Margaret O'Brien, CALIFORNIA TEACHERS ASSOCIATION, Burlingame, California, Philip A. Hostak, OFFICE OF GENERAL COUNSEL, NATIONAL EDUCATION ASSOCIATION, Washington, D.C., for Appellants. Alisa B. Klein, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

COLE, J., (pp. 2-36) delivered an opinion in favor of reversing the district court's judgment of dismissal, in which MARTIN, DAUGHTREY, MOORE, CLAY, GILMAN, and WHITE, JJ., joined, and in which GIBBONS, J., joined in part. SUTTON, J., (pp. 37-67) delivered a separate opinion concurring in the order affirming the district court's judgment, in which BATCHELDER, C.J., BOGGS, COOK, and KETHLEDGE, JJ., joined, and in which McKEAGUE, J., joined as to Part II only, with McKEAGUE, J., (pp. 68-88) also delivering a separate opinion concurring in affirming dismissal, in which ROGERS and GRIFFIN, JJ., joined as to Part II only. GIBBONS, J., (pp. 89-93) delivered a separate opinion in favor of reversing the judgment of the district court.

OPINION

COLE, Circuit Judge. The controversy presently before this Court is neither particularly complicated nor inherently political. Understanding the precise question before us means understanding what this case does not present—namely, this case does not ask us to enter the political arena to judge the relative

merits of the No Child Left Behind Act of 2001 ("NCLB" or "the Act"), 20 U.S.C. §§ 6301-7941. Also, this case has nothing to do with the ongoing debate between the various advocates of state versus federal educational funding. Rather, we need to answer only a straightforward question of statutory interpretation: Whether, analyzed under the Spending Clause of the United States Constitution, the obligations set forth in NCLB are unambiguous such that a state official would clearly understand her responsibilities under the Act.

Plaintiffs-Appellants are school districts and education associations (collectively, "Plaintiffs")[1] that receive federal funding under NCLB in exchange for complying with the Act's various educational requirements and accountability measures. Based on the so-called "Unfunded Mandates Provision," which provides that "[n]othing in this Act shall be construed

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[1] Plaintiffs consist of nine school districts from three different States (Michigan, Texas, and Vermont) and ten education associations from ten different States (Connecticut, Illinois, Indiana, Michigan, New Hampshire, Ohio, Pennsylvania, Texas, Utah, and Vermont). The school districts are Pontiac School District, Laredo Independent School District, Leicester Town School District, Neshobe Elementary School District, Otter Valley Union High School, Pittsford Town School District, Rutland Northeast Supervisory Union (which itself contains eleven school districts), Sudbury Town School District, and Whiting Town School District (collectively, the "school district Plaintiffs"). The education associations are the National Education Association ("NEA") and ten NEA-affiliate education associations: the Connecticut Education Association, the Illinois Education Association, the Michigan Education Association, the Ohio Education Association, the Reading Education Association, the Utah Education Association, the Indiana State Teachers Association, the Texas State Teachers Association, NEA-New Hampshire, and the Vermont NEA (collectively, the "education association Plaintiffs").

to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act," 20 U.S.C. § 7907(a), Plaintiffs filed suit in district court against the Secretary of the United States Department of Education (the "Secretary") seeking a declaratory judgment that they need not comply with the Act's requirements where doing so would result in increased costs of compliance not covered by federal funds. The district court concluded that Plaintiffs must comply with the Act's requirements regardless of any federal-funding shortfall and, accordingly, granted the Secretary's motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

I. BACKGROUND

A. The No Child Left Behind Act

On January 8, 2002, then-President George W. Bush signed NCLB into law. The Act—"a comprehensive educational reform"—amended the Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941 (2003)). *See Connecticut v. Spellings*, 453 F. Supp. 2d 459, 468 (D. Conn. 2006). The ESEA targeted funding to students in low-income schools, and its purposes included overcoming "any effects of past racial discrimination." *George v. O'Kelly*, 448 F.2d 148, 151 (5th Cir. 1971); *accord Barrera v. Wheeler*, 475 F.2d 1338, 1340 (8th Cir. 1973); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 851 (5th Cir. 1966). The ESEA was periodically reauthorized and amended over the next few decades.

In contrast to prior ESEA iterations, NCLB "provides increased flexibility of funds, accountability for student

achievement and more options for parents." 147 Cong. Rec. S13365, 13366 (2001) (statement of Sen. Bunning). The Act focuses federal funding more narrowly on the poorest students and demands accountability from schools, with serious consequences for schools that fail to meet academic-achievement requirements. *Id.* at 13366, 13372 (statements of Sens. Bunning, Landrieu, and Kennedy). States may choose not to participate in NCLB and forgo the federal funds available under the Act, but if they do accept such funds, they must comply with NCLB requirements. *See, e.g.*, 20 U.S.C. § 6311 ("For any State *desiring* to receive a grant under this part, the State educational agency shall submit to the Secretary a plan . . . .") (emphasis added); *see also Spellings*, 453 F. Supp. 2d at 469 ("In return for federal educational funds under the Act, Congress imposed on states a comprehensive regime of educational assessments and accountability measures."). In addition, with enumerated exceptions, under NCLB "the Secretary may waive any statutory or regulatory requirement . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that . . . receives funds under a program authorized by this Act." 20 U.S.C. § 7861 (a).

Title I, Part A, of NCLB, titled "Improving Basic Programs Operated by Local Educational Agencies," continues to pursue the objectives of the ESEA and imposes extensive educational requirements on participating States and school districts, and, likewise, provides the largest amount of federal appropriations to participating States. For example, in fiscal year 2006, NCLB authorized $22.75 billion in appropriations for Title I, Part A, compared to $14.1 billion for the remaining twenty-six parts of NCLB combined. Title I, Part A's stated purposes include meeting "the

educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance." 20 U.S.C. § 6301(2).

In addition to Title I, Part A, NCLB establishes numerous other programs, including a literacy initiative for young children and poor families (Title I, Part B), special services for the education of children of migrant workers (Title I, Part C), requirements that all teachers be "highly qualified" (Title II, Part A), and instruction in English for children with limited English ability (Title III). Plaintiffs' complaint focuses on the educational requirements and funding provisions of Title I, Part A.

To qualify for federal funding under Title I, Part A, States must first submit to the Secretary a "State plan," developed by the State's department of education in consultation with school districts, parents, teachers, and other administrators. 20 U.S.C. § 6311(a)(1). A State plan must "demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards" against which to measure the academic achievement of the State's students. *Id.* § 6311(b)(1)(A). The standards in the State plan must be uniformly applicable to students in all of the State's public schools, and must cover at least reading or language arts; math; and, by the fourth grade, science skills. *Id.* § 6311(b)(1)(C).

States also must develop, and school districts must administer, assessments to determine students' levels of achievement under plan standards. *Id.* § 6311(b)(2)(A). These assessments must show the

percentage of students achieving "proficiency" among "economically disadvantaged students," "students from major racial and ethnic groups," "students with disabilities," and "students with limited English proficiency." *Id.* § 6311(b)(2)(C)(v)(II). Schools and districts are responsible for making "adequate yearly progress" ("AYP") on these assessments, meaning that a minimum percentage of students, both overall and in each subgroup, must attain proficiency. 34 C.F.R. § 200.20(a)(1).

A school's failure to achieve AYP triggers other requirements of Title I, Part A. *See* 20 U.S.C. § 6316(b). If a school fails to make AYP for two consecutive years, it must be identified by the local educational agency for school improvement. 20 U.S.C. § 6316(b)(1)(A). Among other things, a school in improvement status must inform all of its students, including those who have been assessed as proficient, that they are permitted to transfer to any school within the district that has not been identified for school improvement. *Id.* § 6316(b)(1)(E)(i). The school also must develop a two-year plan setting forth extensive measures to improve student performance, including further education for teachers and possible before—or after-school instruction or summer instruction. *Id.* §§ 6316(b)(3)(A)(iii), (ix).

If a school does not achieve AYP after two years of improvement status, it is "identif[ied] . . . for corrective action." *Id.* § 6316(b)(7)(C)(iv). Corrective action involves significant changes, such as replacing teachers who are "relevant to the failure to make [AYP]," or instituting an entirely new curriculum. *Id.* § 6316(b)(7)(C)(iv)(I). If, after a year of corrective action, a school still has not reached AYP, the district must restructure the school entirely; options for re-

structuring include "[r]eopening the school as a public charter school," replacing the majority of the staff, or allowing the State's department of education to run the school directly. *Id.* § 6316(b)(8)(B)(i).

The issue of who must pay to implement these requirements is the heart of this case. NCLB requires that States use federal funds made available under the Act "only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds." 20 U.S.C. § 6321(b)(1). That is, States and school districts remain responsible for the majority of the funding for public education, and the funds distributed under Title I are to be used only to implement Title I programming, not to replace funds already being used for general programming.[2]

While Plaintiffs recognize that the majority of funding for education continues to come from state and local sources, they contend that NCLB does not require them to spend the money drawn from state and local sources on the additional programs required by NCLB. They point to § 7907(a), entitled "Prohibitions on Federal government and use of Federal funds," often referred to as the "Unfunded Mandates Provision," which provides that "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof *to spend any funds or incur any*

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[2] Plaintiffs do not argue that the funds distributed by NCLB are a substitute for those funds that have historically come from state and local sources. Instead, Plaintiffs argue only that they should not be required to incur additional funding obligations to comply with NCLB when those obligations would not be incurred absent the State's attempt at NCLB compliance.

costs not paid for under this Act. 20 U.S.C. § 7907(a) (emphasis added). Plaintiffs argue that this section specifically exempts them from complying with NCLB's requirements where federal funding does not cover the additional costs of complying with those requirements. They further note that former Secretary of Education Rod Paige has explained that "[t]here is language in the bill that prohibits requiring anything that is not paid for." (Pls.' Compl. for Declaratory and Injunctive Relief ("Compl.") 12; Joint Appendix ("JA") 21 (quoting Paige statement of Dec. 2, 2003).)

B. Procedural history

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan seeking a declaratory judgment that NCLB does not require school districts to comply with the Act's educational requirements if doing so would require the expenditure of state and local funds to cover the additional costs of compliance. In the alternative, the complaint alleged that the Act is ambiguous as to whether school districts are required to spend their own funds, and that imposing such a requirement would violate the Spending Clause.

Plaintiffs alleged that in the years following the enactment of NCLB, Congress has not provided States and school districts with sufficient federal funds to comply fully with the Act. For example, for the five years from fiscal year 2002 to fiscal year 2006, Congress appropriated $30.8 billion dollars less for Title I grants to school districts than it authorized in NCLB. (JA 27.) Plaintiffs sought a declaratory judgment stating that "states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does

not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB." (JA 67.) Plaintiffs also sought an injunction prohibiting the Secretary from "withholding from states and school districts any federal funds to which they are entitled under the NCLB because of a failure to comply with the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds to achieve such compliance." (*Id.*)

The district court dismissed the complaint for failure to state a claim. The court focused on the first part of § 7907(a), which, for clarity, we restate in full below:

> General prohibition. Nothing in this Act shall be construed to authorize *an officer or employee* of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a) (emphasis added). The court concluded that "[b]y including the words 'an officer or employee of,' Congress clearly meant [merely] to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute." *Sch. Dist. of Pontiac v. Spellings*, No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253, at * 12 (E.D. Mich. Nov. 23, 2005). "This does not mean," the court explained, "that *Congress* could not [require States or school districts to spend any funds or incur any costs not paid for under this Act], which it obviously has done by passing the NCLB Act." *Id.* at *11. In other words, the district court read § 7907(a) merely to prohibit federal officers and

employees from imposing requirements that were not authorized by the Act on States and school districts, and rejected Plaintiffs' argument that § 7907(a) excuses compliance with requirements of the Act that impose additional costs on the States not funded by the federal government.

Plaintiffs appealed. In a divided, published opinion, the panel below reversed the judgment of the district court. *Pontiac Sch. Dist. v. Sec'y of U.S. Dep't of Educ.*, 512 F.3d 252, 254 (6th Cir. 2008) (vacated). That decision found that Plaintiffs had standing to bring suit and that NCLB failed to provide clear notice to States as required by the Spending Clause. *Id.* at 259, 261. The panel majority concluded that based on the text of § 7907(a), NCLB failed to provide clear notice because a state official could plausibly conclude that the State need not comply with those NCLB requirements that were not covered by federal funding. *Id.* at 269.

On May 1, 2008, a majority of judges of this Court voted to rehear the case *en banc*, vacating the panel's opinion and restoring this case to the docket as a pending appeal.

II. DISCUSSION

A. Justiciability

A threshold question is whether this case is properly before us. As we have previously explained, "[a] claim is not 'amenable to . . . the judicial process,' *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102[ ] (1998), when it is filed too early (making it unripe), when it is filed too late (making it moot) or when the claimant lacks a sufficiently concrete and redressable interest in the dispute (depriving the plaintiff of standing)." *Warshak v. United States*, 532

F.3d 521, 525 (6th Cir. 2008) (*en banc*). This controversy implicates two of these doctrines—standing and ripeness.

1. Standing

First, we must decide whether Plaintiffs have standing to challenge NCLB under the Spending Clause. We review the question of standing de novo. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). Plaintiffs, as the parties now asserting federal jurisdiction, have the burden of establishing standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). To satisfy the constitutional requirement of standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury suffered must be "an invasion of a legally protected interest." *United States v. Hays*, 515 U.S. 737, 743 (1995). This tripartite standing requirement applies to claims under NCLB. *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) (citing *Lujan*, 504 U.S. at 560-61).

Here, because the district court dismissed the complaint at the pleading stage, the assessment of standing is confined to the allegations in the complaint. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may

suffice"; more is required to defeat a motion for summary judgment, and even more is required for a decision on the merits. *Lujan*, 504 U.S. at 561.

We conclude that the school district Plaintiffs meet the three requirements for standing based on their allegation that they must spend state and local funds to pay for NCLB compliance. Since at least one Plaintiff in this action has standing, there is no need to consider whether the education association Plaintiffs also have standing. *See Clinton v. City of N.Y.*, 524 U.S. 417, 431 n. 19 (1998); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Additionally, we need not address whether the school district Plaintiffs' other alleged injuries are sufficient to establish standing. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (finding standing where, although one alleged injury might not occur "for thousands of years," another injury allegedly would occur very soon).

a. Injury in fact

School district Plaintiffs allege that they must spend state and local funds to pay for NCLB compliance:

> Because of the multi-billion dollar national funding shortfalls of NCLB, and the insistence by [the Secretary] that . . . school districts comply fully with all of the NCLB mandates imposed upon them even if NCLB funds that they receive are insufficient to pay for such compliance, . . . school districts have had and will have to spend a substantial amount of non-NCLB funds to comply with those mandates, diverting those funds from other important educational programs and priorities, such as programs for gifted and talented students, courses in foreign languages, art,

> music, computers, and other non-NCLB subjects, class size reduction efforts, and extracurricular activities.

(JA 61-62.) They also allege that if they do not comply with all NCLB requirements, the districts "face the withholding [by the Secretary] of federal funds to which they otherwise are entitled under the NCLB." (JA 65.) Additionally, the school district Plaintiffs claim that inadequate federal funding has caused low rates of student proficiency on standardized tests.

The Secretary consistently has maintained that the school district Plaintiffs must comply with NCLB requirements even if they must spend non-federal funds to do so. School district Plaintiffs allege that the Secretary's insistence that school districts comply fully with NCLB has already forced them to spend state and local funds on NCLB requirements and will continue to require such expenditures in the future. Because this injury already has occurred and is ongoing, it is concrete and actual.

Moreover, the alleged ongoing need of school district Plaintiffs to spend non-federal funds to comply with NCLB requirements is not dependent on the hypothetical actions of "decisions made by the appropriate [state] authorities, who are not parties to this case." *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (holding that city of Rochester taxpayers could not sue the town of Penfield on the theory that Penfield's zoning practices would increase Rochester taxes, because Rochester was not a party). That is, under NCLB, States do not have the discretion to decide that, in the event of a federal-funding shortfall, some districts will continue to receive their previous level of funding and others will not. Instead, under NCLB, state departments of education "shall" allocate fed-

eral NCLB funds to counties or school districts based on formulas provided in NCLB and approved by the Secretary. 20 U.S.C. § 6333(a)(3)(C). Thus, the "injury in this case . . . does not turn on the independent actions of third parties," but on NCLB's funding requirements, which dictate the quantum of funding provided to each school district. *Clinton*, 524 U.S. at 431 n. 19. To the extent the funding received by the school district Plaintiffs under NCLB is insufficient to defray the cost of compliance with NCLB requirements, the districts have sustained a cognizable injury in fact.

b. Traceability

School district Plaintiffs' obligation to spend non-federal funds to comply with NCLB is traceable to the challenged action of the Secretary. The Secretary has interpreted NCLB to mean that "'[i]f a state decides to accept the federal funds [offered under the NCLB], then it's required to implement the law in its entirety.'" (Compl. 12; JA 21 (quoting Rodney Paige, Sec'y, U.S. Dep't of Educ., Remarks to National Urban League (Mar. 25, 2004)) (alterations in original).) And, the Secretary has not granted waivers of NCLB educational requirements based on the insufficiency of federal funding.[3] Therefore, school district Plaintiffs alleged that the spending of non-federal

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[3] Plaintiffs allege that "it would be futile for the plaintiff school districts to ask" for a waiver because of the Secretary's uniform rejection of requests for waivers. (JA 22-23.) The Secretary does not dispute that a request would be futile. Moreover, even if the Secretary granted waivers for the Plaintiffs here, it would not change this Court's Spending Clause analysis, nor would it protect other school districts that may not be granted waivers in the future.

funds to comply with NCLB requirements is directly traceable to the Secretary's interpretation of NCLB.

c. Redressability

Finally, school district Plaintiffs' injury must be redressable by a favorable decision. Among other relief, Plaintiffs seek a declaratory judgment that "school districts are not required to spend non-NCLB funds to comply with the NCLB mandates." (JA 67.) Such a judgment would forbid the Secretary from requiring the expenditure of non-federal funds on NCLB compliance. This would redress the injury alleged by Plaintiffs.

2. Ripeness

Next, we must decide whether Plaintiffs' challenge to NCLB is ripe for judicial review. This Court reviews questions of ripeness de novo. *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003). "In ascertaining whether a claim is ripe for judicial resolution, we ask two basic questions: (1) is the claim 'fit[] . . . for judicial decision' in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is 'the hardship to the parties of withholding court consideration'?" *Warshak*, 532 F.3d at 525 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)) (alternations in original).

This case is ripe for judicial review. In discussing ripeness, this Court aptly has provided both that "the basic rationale of the ripeness doctrine 'is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements,'" *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985)), and that

"[r]ipeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Id.* (citations omitted). These concerns are not present here. The question before this Court is neither abstract nor hypothetical. Plaintiffs present a straightforward, concrete question of statutory interpretation, the answer to which is not dependent on further development of facts or further administrative action. *See Warshak*, 532 F.3d at 528 (explaining that legal questions that are answered "differently in different settings" lack fitness for review). In short, unless we decide this matter, school district Plaintiffs will be forced to continue expending limited state resources to comply with NCLB.

a. Fitness

There is no doubt that Congress has not fully funded the cost of complying with NCLB, and school district Plaintiffs assert that they are forced to spend non-federal monies to comply with NCLB—meaning this dispute over school funding is unquestionably "likely to come to pass." Plaintiffs assert that they already have suffered injury in the expenditure of non-refundable, non-federal dollars in pursuit of compliance with the NCLB. Thus, we need not concern ourselves with the hypothetical, as Plaintiffs are prepared to establish actual ongoing harm.

Similarly, Plaintiffs have demonstrated that their claims arise in a concrete factual context. Simply, we are asked whether under the plain language of NCLB, when the Act is considered in parallel with the Spending Clause, the Secretary may require States to expend non-federal monies. We are not being asked to invalidate the law or to apply NCLB to any particular set of factual circumstances in which we would benefit from further administrative devel-

opments. We must decide only—through traditional techniques of statutory interpretation—whether NCLB complies with the clear-notice requirements of the Spending Clause.

b. Hardship

This dispute falls within the traditional conception of a "hardship" case—namely, a "claimant who faces a choice between immediately complying with a burdensome law or 'risk[ing] serious criminal and civil penalties.'" *Warshak*, 532 F.3d at 531 (quoting *Abbott Labs.*, 3 87 U.S. at 149) (alterations in original).

We see no reason to depart from the jurisprudence that "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 743-44 (1997) (internal quotation marks omitted). Here, school district Plaintiffs must decide between drastic budget reallocation to comply with NCLB and serious statutory consequences, including teacher replacement, school restructuring, school closure and reopening as a charter school, or having schools run by the State's department of education. *See* 20 U.S.C. §§ 6316(b)(7)(C)(iv), (b)(8)(B).

B. Federal Rule of Civil Procedure 19

My colleague Judge McKeague argues that this case must be dismissed under Federal Rule of Civil Procedure 19 because absent parties are necessary to this litigation. McKeague Op. 73-86. Specifically, Judge McKeague contends that the States of Michigan, Texas, and Vermont are required parties to this litigation incapable of joinder and that any relief granted in their absence would be incomplete.

McKeague Op. 76-80. However, this reasoning is not supported by the text of Rule 19 or the relevant case law. Moreover, such a broad interpretation of Rule 19 could have the undesirable effect of foreclosing a vast category of legitimate challenges to federal laws.

1. The text of Rule 19

Under Federal Rule of Civil Procedure 19, "whether a party is indispensable for a just adjudication requires a determination regarding whether the absent party is necessary to the litigation; if so, whether the absent party can be joined in the litigation; and if joinder is infeasible, whether the lawsuit can nevertheless proceed 'in equity and good conscience.'" *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1494 (D.C. Cir. 1995) (quoting former Fed. R. Civ. P. 19 and citing *W. Md. Ry. Co. v. Harbor Ins.* Co., 910 F.2d 960, 961 (D.C. Cir. 1990)). An absent party is required for a litigation if:

> (A) in [the party's] absence, the court cannot accord complete relief among existing parties; or
>
> (B) that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may:
>
> (i) as a practical matter impair or impede the [party's] ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). If an absent required party cannot be joined in the lawsuit, Rule 19 provides that:

> the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the [party's] absence might prejudice that [party] or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the [party's] absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). Our analysis involves two steps: first, we must examine whether the States of Michigan, Texas, and Vermont (the "States") are required parties; second, we must determine whether, in their absence, equity and good conscience require the case to be dismissed. If the answer to either question is no, then Rule 19 does not foreclose this litigation.

Under Rule 19(a), we first determine whether this Court can "accord complete relief among existing parties" in the States' absence. Fed. R. Civ. P. 19(a)(1)(A). "Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought." *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996) (citing *Sindia Expedi-*

tion, Inc. v. Wrecked & Abandoned Vessel, 895 F.2d 116, 121 (3d Cir. 1990) and quoting 3A Moore's Federal Practice 19.07-11 at 93-98 (2d ed. 1989) (internal quotations omitted in original)); *see also United States v. County of Arlington*, 669 F.2d 925, 929 (4th Cir. 1982); *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981). Here, neither Plaintiffs nor the Secretary would receive incomplete relief without the States as parties. As will be discussed in detail below, the issue arising between Plaintiffs and the Secretary is whether NCLB provides the clear notice required under the Spending Clause. If NCLB fails to provide clear notice, this Court may uphold the Plaintiffs' interpretation of § 7907(a), thus preventing the forced expenditure of non-NCLB funds. If NCLB provides clear notice, this Court may uphold the Secretary's interpretation. Such declaratory relief for either side is complete relief and does not require joinder of the States.

While it is true that both statewide plans and district plans may need to be amended following the disposition of this case, NCLB itself contemplates periodic review of these plans and the submission of revisions to the Secretary as necessary. *See* 20 U.S.C. § 6311(a), (f). Such administrative actions have no bearing on the completeness of the requested declaratory relief. Moreover, even if some future litigation were likely between Plaintiffs or the Secretary and the States, the "possibility that the successful party to the original litigation would have to defend its rights in a subsequent suit by the [absent party] does not make it a necessary party to the action." *Angst*, 77 F.3d at 705 (citing *Sindia*, 895 F.2d at 122); *see also MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006) ("While there is

no question that further litigation [involving an absent party] is inevitable if MasterCard prevails in this lawsuit, Rule 19(a)(1) is concerned only with those who are already parties."); *LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 305 (8th Cir. 1983) (determining that Rule 19(a)(1)(A) applies to current parties, "not [to] the speculative possibility of further litigation between a party and an absent person"). "Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded." *Smith v. United Bhd. of Carpenters & Joiners of Am.*, 685 F.2d 164, 166 (6th Cir. 1982); *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1054 n.5 (3d Cir. 1988) ("We observe that the advisory committee note to Rule 19(a) indicates that the question of 'complete relief' may not denote final adjudications of all claims between the parties, so long as the relief actually afforded to the parties in the action is meaningful."). Regardless of the presence or absence of Michigan, Texas, or Vermont in this case, the declaratory relief this Court can provide is meaningful and complete, and we thus conclude that the States are not required parties under 19(a)(1)(A).

Notwithstanding this determination, the States still may be required under Rule 19(a)(1)(B). Rule 19(a)(1)(B)(i) exists to protect absentee parties, asking the Court to consider whether disposing of the matter in the parties' absence would "impair or impede the [parties'] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). We find that resolving this dispute does not impair or impede such an interest. First, the States do not have an obvious interest in this dispute that requires protection. In general, under NCLB, the

States act as intermediaries through which federal funds flow to local schools to fund NCLB initiatives. Accordingly, the States' interests do not readily align with either the Plaintiffs' or the Secretary's interpretation of NCLB in this Spending Clause dispute. Because no party has articulated an interest unique to the States and because we are disinclined to speculate as to the existence of such interests, there simply is no basis on which to find that the States possess an interest requiring its participation.

Second, even if the States have a particular interest in this dispute, they had the opportunity to intervene to protect that interest but declined to participate. Had Michigan, Texas, or Vermont sought intervention, there is little doubt that this Court would have allowed each State to join as an intervenor. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) ("We join other circuits in holding that the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action."). Moreover, the States could have provided the Court with arguments as to their interests without jeopardizing sovereign immunity by appearing as amici curiae. However, it would turn Rule 19 analysis on its head to argue that the States' interests are now impaired because they declined to participate in this much-publicized case.[4]

Last, we believe that the States' interests, if they have any, are adequately represented by the existing

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[4] In fact, several States did participate in this lawsuit as amici curiae. *See* Amici Curiae Br. of the States of Connecticut, Delaware, Illinois, Maine, Oklahoma, Wisconsin, and the District of Columbia (filed Apr. 3, 2006); Amicus Curiae Br. of the Governor of the Commonwealth of Pennsylvania (filed Apr. 6, 2006).

parties. *See Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2189 (2008) (stating that parties "are required entities because [w]ithout them . . . their interests in the subject matter are not protected") (alterations in original); *see also Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 504-05 (4th Cir. 2005) (determining that absentees were not necessary parties when their interests were identical to those of existing parties who were capable of adequately representing the absentees' interests); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (concluding, in a challenge to fishing regulations, that the United States adequately represented tribes who were, therefore, not necessary parties); *see also Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984) (reasoning that the Department of Health & Human Services ("HHS") was not a necessary party under Fed. R. Civ. P. 19(a)(1)(13)(i) because its interests were adequately protected by the United States Attorney who would make "every argument that HHS would or could make"). For these reasons, the States are not required parties under Rule 19(a)(1)(13)(i).

Finally, in examining if the States are required parties under the text of Rule 19, we must consider whether disposing of this action without the States would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Here, no such risk exists. In fact, the opposite is true. Judicial economy is served, and the threat of inconsistent obligations is reduced, by deciding the present controversy because the existing parties as well as absent parties then will be aware of their rights and responsibilities under NCLB. Thus, under Rule 19(a)

(1)(13)(ii), we conclude that the States are not required parties.

2. Relevant Rule 19 case law

There is little precedent supporting the broad reading of Rule 19 urged by my colleague. In the closest case, *Kickapoo Tribe*, the D.C. Circuit concluded that Kansas was an indispensable party under Rule 19 and remanded to the district court with instructions to dismiss the case. 43 F.3d at 1500. The lawsuit filed by the Kickapoo Tribe against the Secretary of the Interior sought to invalidate a compact approved by the Secretary under the Indian Gaming Regulatory Act ("Gaming Act"). *Id.* at 1493-94. However, that case presented an entirely different challenge from the one at hand. Rather than challenging the federal Gaming Act, the Kickapoo Indians challenged a compact made between the Kickapoo Indians and the State of Kansas, and the case involved a question of the Kansas Governor's authority under Kansas law to sign the compact. *Id.* at 1494. There, it was clear that Kansas had an interest both in the compact and in the Governor's authority under Kansas law. Here, the States possess no similar interest in the interpretation of NCLB, nor is there any challenge to the States' authority to administer their educational programs under state law. With *Kickapoo* Tribe distinguished, there is no support for extending Rule 19 to the case before us. In fact, we are unable to find a single case in which a court of appeals has dismissed a challenge to the interpretation of a federal statute because a relevant State could not be joined.

On the other hand, many federal laws requiring state administration and implementation have been challenged without participation by the relevant States. For example, the recent Supreme Court cases

of *Forest Grove School District v. T.A.*, No. 08-305, 2009 U.S. LEXIS 4645 (June 22, 2009), *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), and *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), all involved challenges similar to this case (albeit to the Individuals with Disabilities Education Act ("IDEA")), in which, as Judge McKeague acknowledged, the Court "issued holdings that were not only binding on the parties, but also, for all practical purposes, binding as precedent on the respective States" yet none of those cases was dismissed under Rule 19. McKeague Op. 84. Similarly, the Supreme Court has decided environmental cases involving challenges to the interpretation of federal statutes administered, in part, by the States without requiring state participation. *See, e.g., Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (interpreting the federal Clean Air Act without North Carolina's participation); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (interpreting the federal Clean Water Act without Florida's participation). Thus, under Rule 19, a State's participation is not required simply because the case's outcome might affect the State.

3. Policy

To hold that Rule 19 requires the States' joinder in this case would greatly expand the class of required or necessary parties under the Rule. Making the States required parties in this litigation and ultimately dismissing this action would have the undesirable effect of foreclosing a vast category of challenges to federal laws—namely, any challenge to a federal statute where a State plays a role in the administration of the statute and possesses an interest in its admin-

istration, but chooses not to join the lawsuit. Under my colleague's reasoning, all pending and future NCLB and IDEA challenges in this Circuit would be foreclosed. Such an interpretation would also provide strong precedent for the dismissal of pending and future challenges regarding environmental, transportation, and other Spending-Clause suits, if the relevant States choose not to participate. This cannot be the intended purpose or effect of Rule 19.

While the States may have an interest in the outcome of this case, that is not enough. To be considered required parties, Michigan, Texas, and Vermont must fall within either of Rule 19's two categories. They do not. The States are simply not required parties under Rule 19, and their joinder is unnecessary for the continuation of this lawsuit.

C. The clear-notice requirement under the Spending Clause

Under the Spending Clause, "Congress has broad power to set the terms on which it disburses federal money to the States." *Arlington*, 548 U.S. at 296 (citing *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987)). "[B]ut when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) and *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982)). Legislation enacted under "'the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17). "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

"By insisting that Congress speak with a clear voice," the Supreme Court enables States "to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17. Moreover, "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Id.* at 17-18.

In *Pennhurst*, the Supreme Court applied these principles to conclude that States participating in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 ("DDA"), 42 U.S.C. §§ 6000-81, were not required to assume the costs of providing certain treatment and services to mentally disabled citizens. 451 U.S. at 5. The DDA provided financial assistance to participating States to aid them in creating programs to care for and treat the mentally disabled. *Id.* at 11. The DDA also included a variety of requirements for the receipt of federal funds, such that the States submit a plan to the Secretary of the Department of Health and Human Services to evaluate the services provided under the DDA. *Id.* at 12. At the heart of the case was the DDA's "bill of rights" provision, which provided that mentally disabled citizens "have a right to appropriate treatment, services, and habilitation for such disabilities" to be provided "in the setting that is least restrictive of the person's personal liberty." *Id.* at 13. The plaintiffs, certain disabled citizens of Pennsylvania (a participant in the DDA), sued their state-owned institution to enforce these "rights"; that is, to compel Pennsylvania to pay for the costs of the services promised by the "bill of rights." *Id.*

The Supreme Court held, however, that the language in the DDA's "bill of rights" provision did not

create enforceable obligations on the State. *Id.* at 22. The Court explained that the provision's terms, "when viewed in the context of the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties." *Id.* at 22-23. The Court also noted that the Act's "plain language" supported this view. *Id.* at 23. It stated that "[w]hen Congress intended to impose conditions on the grant of federal funds," as it did in other sections of the DDA, "it proved capable of doing so in clear terms," by, for example, using the term "conditioned." *Id.* The "bill of rights" section, "in marked contrast, in no way suggest[ed] that the grant of federal funds [was] 'conditioned' on a State's funding the rights described therein." *Id.* The Court further explained that the federal Government had no authority under the DDA to withhold funds from States for failing to comply with the "bill of rights" section. *Id.* Accordingly, that section could "hardly be considered a 'condition' of the grant of federal funds." *Id.* The Court also explained that the funds Congress provided to Pennsylvania under the DDA were "woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting." *Id.* at 24. This confirmed that "Congress must have had a limited purpose in enacting" this provision because Congress "usually makes a far more substantial contribution to defray costs" when it "impose[s] affirmative obligations on the States." *Id.* "It defies common sense," the Court reasoned, "to suppose that Congress implicitly imposed this massive obligation on participating States."[5] *Id.*

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[5] In this case, Plaintiffs do not dispute that Congress did clearly intend to place conditions on the grant of federal funds. However, there is no mention of the cost of compliance any-

The Court reiterated that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* "That canon," the Court continued, "applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* "The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but *whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.*" *Id.* at 25 (emphasis added). Thus, the Court concluded that "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with" the "bill of rights" provision in the DDA. *Id.*

The Supreme Court applied these principles again in *Arlington*, where a similar question arose under the IDEA, 20 U.S.C. § 1400 et. seq. *Arlington*, 548 U.S. at 296-300. Enacted under the Spending Clause, the IDEA "provides federal funds to assist state and local agencies in educating children with disabilities and conditions such funding upon a State's compliance with extensive goals and procedures." *Id.* at 295 (internal quotation marks and citation omitted). The plaintiffs in *Arlington* sued under the IDEA on behalf of their son to require the Arlington Board of Education to pay for their son's private-school tuition for specified school years. *Id.* at 294. The plaintiffs prevailed in the district court, and the Second Circuit affirmed. *Id.* As the prevailing parties, the plaintiffs

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where in the text of NCLB. Plaintiffs argue that Congress's silence cannot be interpreted as a clear statement that States and local governments would be required to spend their own funds to cover any shortfall of federal funds.

then sought fees for the services of an educational consultant who assisted them throughout the litigation. *Id.* Central to the dispute in *Arlington* was the IDEA's provision that a court "'may award reasonable attorneys' fees as part of the costs'" to parents who prevail in an action brought under the Act. *Id.* at 297 (quoting 20 U.S.C. § 1415(i)(3)(B)).

Noting that "resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause," the Supreme Court ultimately held that the plaintiffs were not entitled to the expert fees requested. *Id.* at 295. The Court reaffirmed *Pennhurst's* principle requiring clear notice to States of their obligations under such legislation and explained how that principle should be applied: The Court "must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." *Id.* The Court "must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees." *Id.* "In other words," the Court continued, "we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case." *Id.*

Applying these principles, the Court first considered the text of the IDEA. *Id.* The Court noted that it has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* (internal quotation marks and citation omitted). The Court then explained that, although the IDEA fee provision "provides for an award of 'reasonable attorneys' fees,' this provision does not even hint that acceptance of

IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." *Id.* at 297. Accordingly, the Court rejected the plaintiffs' argument that, because expert fees amounted to "costs" in IDEA proceedings and because the provision allowed for reasonable attorneys' fees "as part of the costs," the plaintiffs were entitled to expert fees. *Id.* at 297-98. The Court explained that the provision "certainly fails to provide the clear notice that is required under the Spending Clause." *Id.* at 298. The Court then explained that other provisions of the IDEA supported this view of the text. *Id.* at 298-301. For example, the IDEA includes detailed provisions to ensure that attorneys' fees are reasonable, but lacks comparable provisions regarding expert fees. *Id.* at 298. Additionally, the Court concluded that its holding was consistent with prior cases addressing the definitions of costs and fees. *Id.* at 301-02.

The Court remained unswayed in this conclusion even in light of evidence that Congress intended the opposite interpretation of the expert-fees provision. The plaintiffs noted that Congress approved a Conference Report stating that "[t]he conferees intend[ed] that the term 'attorneys' fees as part of the costs' include[s] reasonable expenses and fees of expert witnesses . . . ." *Id.* at 304 (quoting H.R. Conf. Rep. No. 99- 687, at 5 (1986)). "No Senator or Representative voiced any opposition to this statement in the discussion preceding the vote on the Conference Report—the last vote on the bill before it was sent to the President." *Id.* at 309 (Souter, J., dissenting). The Court responded that, "[u]nder these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough." *Id.* at 304. "In a Spending Clause case, the key is not

what a majority of the Members of both Houses intend but *what the States are clearly told* regarding the conditions that go along with the acceptance of those funds." *Id.* (emphasis added). This legislative history, therefore, was not "sufficient to provide the requisite fair notice" that States bore this liability under the IDEA. *Id.; but see id.* at 309 (Souter, J., dissenting) ("I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.").

D. NCLB

1. Text of the Act

We must view NCLB from the perspective of a state official who is engaged in the process of deciding whether the State should accept NCLB funds and the obligations that accompany those funds. *See Arlington*, 548 U.S. at 295. In other words, we must determine whether NCLB furnishes clear notice to the official that her State, if it chooses to participate, will have to pay for any additional costs of implementing the Act that are not covered by the federal funding provided for under the Act. In examining NCLB, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy," *Pennhurst*, 451 U.S. at 18 (citations and internal quotations omitted), however, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (citations omitted). "Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Pennhurst*, 451 U.S. at 17-18 (citation

omitted). Here, no such provision exists. NCLB simply does not include any specific, unambiguous mandate requiring the expenditure of non-NCLB funds. Neither Judge McKeague, Judge Sutton nor the parties set forth any provision of NCLB that explicitly spells out the States' fiduciary obligations under this Act. To the contrary, § 7907(a) of NCLB provides that "[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." Based on this provision, a state official likely would reach the opposite conclusion—namely, that her State would not be forced to provide funding for NCLB requirements for which federal funding falls short. Thus, we conclude a state official would not clearly understand that accepting federal NCLB funds meant agreeing to use state and local funds to meet goals rendered otherwise unreachable by deficient federal funding.

This is not to say that the Secretary's interpretation of the Act is frivolous. But the only relevant question is whether the Act provides *clear notice to the States* of their obligation. *See Arlington*, 548 U.S. at 296. With this rule in mind, we turn to the various interpretations of the text offered by the parties and explain why we are not persuaded that the States' funding obligations are clear.

2. Plaintiffs' interpretation

Plaintiffs argue that the plain language of § 7907(a) excuses them from paying for the costs of compliance with NCLB that exceed those covered by federal funding. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary

meaning of that language accurately expresses the legislative purpose." (internal quotation marks omitted)). For convenience, the language of § 7907(a) is as follows:

> General prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to *spend any funds or incur any costs not paid for under this Act.*

20 U.S.C. § 7907(a) (emphasis added). The operative language under the Plaintiffs' reading of § 7907(a) is: "Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." Read in this way, the clause exempts Plaintiffs from any costs that exceed federal funds.

Admittedly, there are problems with this interpretation. First, § 7907(a)'s placement within the statute weakens Plaintiffs' argument. Located in a section entitled, "Prohibitions on Federal Government and use of Federal funds," § 7907(a) is followed by three additional prohibitions: "Prohibition on endorsement of curriculum," "Prohibition on requiring Federal approval or certification of standards," and a prohibition on "mandat[ing] national school building standards." 20 U.S.C. § 7907(b), (c), and (d). These provisions expressly prohibit federal officials from imposing on States certain *additional* conditions to the requirements of NCLB. Because agencies generally have broad power to interpret and administer law, this section might be concerned with preventing

federal commandeering of state officials as well as limiting agency authority in administering NCLB.

Interpreted in this way, the first clause of § 7907(a) prohibits federal officers or employees from commandeering the state educational system. 20 U.S.C. § 7907(a) ("Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources . . . ."). Like the other subsections of § 7907, § 7907(a) arguably could be concerned with preventing the imposition of *additional* costs on states. Instead of prohibiting states from bearing *any* costs of compliance, the second clause may prohibit *additional* impositions on a State that are not agreed to by the State or set forth in NCLB. In other words, Congress may have intended to prohibit the expansion of any of the requirements under NCLB to micro-manage state officials in any way not expressly provided for under NCLB.

Second, while the Plaintiffs provide strong evidence that many States and indeed the former Secretary interpreted NCLB not to impose costs exceeding federal funding, 6 their interpretation ignores the history of education funding,[6] which suggests that Congress did not intend to fund all aspects of compliance with NCLB. The prior panel's dissent noted as much: "The notion that Congress intended to pay in full for a

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[6] Former Secretary of Education Rod Paige described the Act as "contain[ing] language that says things that are not funded are not required." (Compl. 11; JA 20.) He later emphasized that "if it is not funded, it's not required. There is language in the bill that prohibits requiring anything that is not paid for." (Compl. 12; JA 21.)

testing and reporting regime of indeterminate cost, designed and implemented by States and school districts, not federal agencies, is not only nonsensical and fiscally irresponsible, but also contravenes the traditional recognition of state and local governments' primary responsibility for public education." *Pontiac Sch. Dist.*, 512 F.3d at 277 (McKeague, J., dissenting). Certainly, the history of education funding cuts against Plaintiffs' reading of § 7907(a) that Congress intended to exempt States from the costs of compliance with NCLB.

3. The Secretary's interpretations of the text

Two other interpretations of § 7907(a) have been advanced in this case, both of which—if Congress had clearly expressed them—would counter Plaintiffs' argument that § 7907(a) exempts the States from covering the costs of NCLB compliance in excess of federal funding. The first, which the district court adopted, is that this section merely prevents officers and employees of the federal government from imposing additional, unauthorized requirements on the participating States. The second is that this section simply emphasizes that state participation in NCLB is entirely voluntary, but that once a State chooses to participate, it must comply fully with NCLB requirements regardless of whether federal funding is adequate to cover the cost of compliance. As discussed below, neither of these interpretations is self-evident.

a. Stopping rogue federal officers or employees

The view that § 7907(a) simply restricts federal officials from imposing additional requirements—that is, those not authorized by the Act—on participating States arises from the first part of § 7907(a),

which discusses "an officer or employee of the Federal Government." This reading interprets the Act to preclude any such officer or employee from mandating that a State incur costs not paid for under (that is, costs not authorized by) the Act:

> General prohibition. *Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to* mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or *mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.*

20 U.S.C. § 7907(a) (emphasis added).

In accepting this interpretation, the district court explained, the "[d]efendant argues convincingly that this sentence simply means no federal 'officer or employee' can require states or school districts to 'spend any funds or incur any costs not paid for under this Act.'" *Pontiac*, 2005 U.S. Dist. LEXIS 29253, at *11. The court further explained that, "[b]y including the words 'an officer or employee of,' Congress clearly meant to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute." *Id.* at * 12. In sum, the court concluded that § 7907(a) merely prevents rogue officers from imposing requirements not authorized by the Act. There are two problems with this interpretation.

First, it is not evident that the "officer or employee" language modifies the final clause of § 7907(a) discussing incurring costs under the Act. In other words, the "officer or employee" language reasonably can be

read to modify only the middle clause regarding state and local control over curricula, as follows: "Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources . . . ." 20 U.S.C. § 7907(a). Under this reading, the final clause is modified by the opening clause: "Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." *Id.* In this way, the Act prevents federal officers from controlling school curricula and allocations of local funds, but says nothing about officers mandating States to spend funds or incur costs for unauthorized obligations.

Second, if the "officer or employee" language is interpreted to modify the final clause, more fundamental problems emerge. For one, such a reading would require us to substitute words that are not in the statutory text ("Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not [*authorized under this Act*]") for words that are in the text (". . . or incur any costs *not paid for under this Act*"). Stating that a federal officer cannot require a State to incur any costs "not paid for" under the Act is, to say the least, is an unusual way of saying that an officer cannot require a State to incur costs for something that is not authorized under the Act. Were Congress truly concerned about this sort of ultra vires conduct by federal officers and employees, it could have said so expressly. Even if this were Congress's concern, we would be left with the following tautology: This Act does not authorize federal

officers or employees to require States to incur costs for anything that the Act does not authorize.

b. Emphasizing that participating in the Act is voluntary

The Secretary also contends that the reference in the final clause of § 7907(a) to a State's costs under the Act simply emphasizes that a State's decision to accept federal funding under NCLB is entirely voluntary. The Secretary notes that this section provides limits on what the Act (or, if one accepts the reading discussed above, on what federal officers and employees) can "mandate" the States to do:

> General prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to *mandate*, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or *mandate* a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a) (emphasis added). The Secretary argues that Congress fully understood that a statute, such as NCLB, that imposes conditions on a receipt of federal funds is not a mandate. Rather, the section is intended to clarify that States would not be subject to requirements that formed no part of the conditions set out in the statute. To support this reading, the Secretary notes that the Unfunded Mandates Act ("UMA"), 2 U.S.C. § 658(5)(A)(i)(II), defines "federal intergovernmental mandate" to exclude voluntary participation in federal programs. This reading is also flawed.

Plaintiffs do not contend that NCLB—as a whole—is an unfunded mandate forced upon the States. They appear willing to concede that NCLB is a voluntary program, and, therefore, their argument focuses on § 7907(a), not on the UMA.[7] Plaintiffs argue that, now that they are participating in NCLB, the Secretary is imposing (that is, "mandating") liabilities that they did not bargain for—and that are expressly prohibited by § 7907(a)—when they signed onto NCLB. There are at least three additional reasons why § 7907(a) should not be read to merely emphasize the voluntariness of the program.

First, it is not apparent that § 7907(a) addresses States' voluntary participation in NCLB as opposed to their obligations after they have agreed to participate. The Secretary's reading would be easier if the Act stated that nothing in it shall be construed to mandate a State to "comply with the Act" or that nothing in the Act shall be construed to mandate a State to "incur any costs under this Act"—language like that would indicate that States can choose not to comply with the Act altogether. Instead, the text provides that nothing in the Act shall be construed to

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[7] The amici question, however, whether a State can, as a practical financial matter, refuse federal funding under NCLB. *See, e.g.*, Amicus Curiae Br. of the Governor of the Commonwealth of Pennsylvania at 20 (noting that "states have come to depend upon [federal] funds to provide extra assistance to students who are economically and academically disadvantaged" and that "states are coerced to accept additional and financially burdensome requirements, so that they may continue to provide services and programs that they have offered to their neediest students for years"); *see also New York v. United States*, 505 U.S. 144, 175 (1992) (noting in another context that "Congress has crossed the line distinguishing encouragement from coercion").

mandate a State to "incur any costs *not paid for under this Act*"—language that a State could plausibly interpret to relate to its obligations after it has agreed to comply with the Act. Indeed, based on the text of § 7907(a), Vermont has passed a law providing that neither the State nor its subdivisions will be required to "incur any costs not paid for under the Act in order to comply with the provisions of the Act." Vt. Stat. Ann. tit. 16 § 165 (2003). In short, it is not apparent that § 7907(a) relates merely to the States' freedom to choose whether to opt into the Act in the first place.

Second, the use of the exact language of § 7907(a) in the Perkins Vocational Education Act ("Perkins Act"), 20 U.S.C. §§ 2301-2471 (1988), indicates that this language concerns a State's funding obligations under NCLB, rather than voluntary compliance with the Act. Under the Perkins Act, federal grants are issued to "'assist the States to expand, improve, modernize, and develop quality vocational education programs in order to meet the needs of the Nation's existing and future work force for marketable skills and to improve productivity and promote economic growth.'" *Pennylvania v. Riley*, 84 F.3d 125, 127 (3d Cir. 1996) (quoting 20 U.S.C. § 2301(1)). Section 2306a of the Perkins Act, entitled "Prohibitions," mirrors NCLB's § 7907(a), but adds a final clause:

> (a) Local control. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this

> Act, *except as required under sections 112(b), 311(b), and 323.*

20 U.S.C. § 2306a(a) (emphasis added). The sections referred to in this final clause require agencies in participating States to spend non-federal funds for specific purposes. *See, e.g.*, 20 U.S.C. § 2413(a) (Perkins Act § 323) ("Except as provided in subsection (b), for each fiscal year for which an eligible agency receives assistance under this Act, the eligible agency shall provide, from non-Federal sources for the costs the eligible agency incurs for the administration of programs under this Act, an amount that is not less than the amount provided by the eligible agency from non-Federal sources for such costs for the preceding fiscal year."). Thus, the final clause—absent in NCLB—provides explicit exceptions describing when participating States do have to expend their own funds when complying with the Perkins Act's requirements. The common language in these Acts, therefore, does not simply reiterate that States may or may not participate in the federal program. While there are differences between the Perkins Act and NCLB, the differences in the overall structure of the statutes do not negate the informative role that the identical sixty-two-word provision found in both of the statutes can provide. In the Perkins Act, the sixty-two-word provision is followed by exceptions to the provision. In NCLB, the sixty-two-word provision is followed by no exceptions. The difference between the Perkins Act and NCLB in this regard shows that Congress is capable of explicitly stating when States must provide funding under these Acts. *Cf. Pennhurst*, 451 U.S. at 17-18 ("[I]n those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.").

Third, the Secretary's comparison with the provisions of the UMA sheds little light here, as (1) NCLB makes no reference to the UMA's definition of "mandate," which excludes voluntary participation in federal programs, and (2) "the label 'mandate' is often applied to obligations that states assume voluntarily in order to qualify for federal funds." Patricia T. Northrop, Note, *The Constitutional Insignificance of Funding for Federal Mandates*, 46 Duke L.J. 903, 903 n.2 (1997). Indeed, another section of the UMA itself defines "mandate" to include a duty arising from voluntary participation in federal programs. 2 U.S.C. § 1555 (defining the phrase for purposes of a commission that would review federal mandates).

E. Whether NCLB satisfies the clear-notice requirement of the Spending Clause

Whether or not Congress intended to fund all the costs of compliance with NCLB, if Congress did not provide clear notice to the States, any requirement that States fund the excess costs of compliance is unenforceable. The Spending Clause permits Congress to condition its grant of federal money to States only if it does so unambiguously. The appropriate inquiry is not whether Congress *intended* States to fund some of the costs of compliance, but whether it provided the States with *clear notice* of this intention. *See Arlington*, 548 U.S. at 296.

Viewing the Spending Clause relationship between a State and the federal government as a contract, the Supreme Court has stated that "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Pennhurst*, 451 U.S. at 17. The Secretary cites *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985), for the

proposition that "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." The Secretary argues that, in contrast to general contract law, ambiguities in a grant program must not necessarily "be resolved against the party who drafted the agreement, *i.e.*, the Federal Government." *Id.* at 666.

However, even when the textual ambiguities are resolved in favor of the federal Government, NCLB still fails the Spending Clause inquiry because it does not provide clear notice to States that they must incur the costs of compliance. In § 6332(b)(1), Congress acknowledged the possibility that it might not be able to provide all of the funds for which States are eligible under NCLB, and Congress provided for a pro rata distribution if such a shortfall were to occur. But Congress never clearly explained who would be responsible for the remaining costs if and when it could not cover them. Thus, not only did Congress never specifically articulate that States would be responsible for covering any additional costs of compliance, but Congress's inclusion of § 7907(a) further confuses the issue of potential state liability.

When asking "whether such a state official would clearly understand . . . the obligations," *Arlington*, 548 U.S. at 296, the answer must, therefore, be "No." We need not decide which of the three above described interpretations of § 7907(a) is correct as that is not our relevant inquiry. They are all plausible, and they are all flawed. While the Secretary may be correct that Congress did not intend to provide full funding for NCLB, many reasonable authorities have interpreted NCLB to mean precisely the opposite. "When

[Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin, and the District of Columbia] acted to accept NCLB Act funding and to adopt NCLB Act requirements, it was with the understanding that the Secretary of Education would comply with all of the provisions of the NCLB Act, including the Unfunded Mandates Provision." (Amicus Br. of the States of Conn., Del., Ill., Me., N.M., Okla., Wis., D.C. at 4.) Further, the district court, this Court's prior panel majority, and the panel dissent all have interpreted § 7907(a) differently. Even the former Secretary of Education found that § 7907(a) means the opposite of what the current Secretary claims. Consequently, the only thing clear about § 7907(a) is that it is unclear.

III. CONCLUSION

NCLB rests on the most laudable of goals: to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301. Here, nobody challenges that aim. But a state official deciding to participate in NCLB reasonably could read § 7907(a) to mean that the State need not comply with requirements that are "not paid for under the Act" with federal funds.

Congress has not "spoke[n] so clearly that we can fairly say that the State[s] could make an informed choice" to participate in the Act with the knowledge that they would have to spend non-NCLB funds to comply with the Act's requirements. *Pennhurst*, 451 U.S. at 25. If Congress intended otherwise, the ball is properly left in its court to make that clear. *See Arlington*, 548 U.S. at 306 (Ginsburg, J., concurring).

Finally, I would not have this opinion read so broadly as to eviscerate the other mandates of NCLB.

The record is clear that the States accepted NCLB funding under conditions spelled out in the Act. There should be no doubt that States and school districts must comply with the mandates to the extent of NCLB funds received and must support their own prior levels of funding as NCLB requires. Plaintiffs' ongoing responsibilities under NCLB are thus among the issues that I would have the parties and the district court consider on remand. Accordingly, I would reverse the district court's judgment dismissing Plaintiffs' complaint and remand for further proceedings consistent with this opinion.

OPINION

SUTTON, *Circuit Judge*, concurring in the order. Judge Cole and Judge McKeague have written well-reasoned opinions about this difficult case, but I find myself unable to join either one in full. I write separately to explain my position, which comes down to embracing Judge Cole's standing and justiciability conclusion and Judge McKeague's merits conclusion at the panel stage.

I.

Standing. I agree with Judge Cole that the school districts have Article III standing to file this lawsuit. Cole Op. at 9-12. The school districts have alleged a sufficient "injury in fact": the Secretary's threatened withholding of federal funds to which they are otherwise entitled. In a declaratory judgment action, "injury in fact" turns on whether the threatened harm is real and imminent, as opposed to speculative and distant. *See MedImmune, Inc v. Genentech, Inc.*, 549 U.S. 118, 127-2 8 (2007). This threatened harm is real and sufficiently imminent. The Secretary has consistently denied waivers seeking to evade the Act's requirements due to insufficient federal funding, and the school districts fairly allege that "noncompliance with [the Act's] mandates due to lack of funds will result in the withholding of . . . federal funds." Compl. ¶ 16; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Putting the school districts to the choice of abandoning their legal claim or risking sanctions "is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *MedImmune*, 549 U.S. at 128 (internal quotation marks omitted). *South Dakota v. Dole*, 483 U.S. 203, 205 (1987), involved a similar threat—that the government would withhold federal funds—and the

Court resolved the merits of that declaratory judgment action without saying a word about standing.

The injury also is fairly traceable to the challenged action of the Secretary, who has authority to withhold the funds and who has declined to relax the testing and assessment requirements of the Act, even if the school districts cannot meet the requirements with federal funds alone. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). And enjoining the Secretary from withholding federal funds for failing to comply with the Act's requirements will redress the threatened injury. *See id.* at 180-81; Cole Op. at 12.

(As an aside, the school districts separately claim injury in fact due to their ongoing expenditure of local funds to comply with the Act. *See also* Cole Op. at 10-11. But this theory does not necessarily establish a redressable injury. An injunction against the Secretary will stop him from cutting off federal funds for non-compliance, but it will not require the States to roll back their statutes and regulations implementing the Act's requirements. A State's alteration of its own statutes and regulations turns on "choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989). The pleadings do not disclose how Michigan, Texas and Vermont "implement[ ] a single, statewide State accountability system" ensuring adequately yearly progress, 20 U.S.C. § 6311(b)(2)(A), but their implementing regulations almost assuredly affect the school districts. Yet because one redressable injury suffices to establish standing, the validity of this alternative theory makes no difference.)

Ripeness. The claims also are fit for judicial review, and the districts would suffer hardship if we declined to consider them. *See Abbott Labs. v. Gardner*, 3 87 U.S. 13 6, 149 (1967); Cole Op. at 12-14. Because this dispute raises an unvarnished question of law that will not benefit from further factual development, it presumptively is ripe for review. *See Dixie Fuel Co. v. Comm'r of Social Sec.*, 171 F.3d 1052, 1058 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003). "Nothing would be gained by postponing a decision" when "[t]he issue presented in this case is purely legal, . . . will not be clarified by further factual development" and hardship to the parties exists. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581-82 (1985); *see* Cole Op. at 13-14.

While further administrative proceedings might sharpen the nature of some of the school districts' claims, they would not alter or make more concrete the nature of the legal question. The Secretary has made his position about the meaning of the Act clear in public statements, in his stance in this case and in related litigation pending in the Second Circuit. Requiring the school districts to seek waivers or propose plan revisions that the Secretary has confirmed he will not grant—because his interpretation of the Act prevents him from doing so—would merely prolong the litigation, already entering its fifth year. Nor would it help any of the participants in this case, least of all the students attending the affected schools, which presumably is why no party raised this issue on its own. *See Union Carbide*, 473 U.S. at 581-82. No Lawyer Left Behind is not the name of the Act.

Civil Rule 19 (a). I do not agree that Michigan, Texas and Vermont are necessary parties, now called "required" parties, under Rule 19(a) and cannot agree that we must dismiss the complaint in their absence. Let me start by resisting the idea that we must, or should, suddenly invoke Rule 19 to resolve this case—a rule that would appear for the first time in the record and pleadings of this case in our decision dismissing the complaint. I accept that the federal courts may, as a matter of discretion, raise required-party issues under Rule 19(a) on their own and may do so for the first time on appeal—even when the parties have forfeited the issue. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 3 90 U.S. 102, 111 (1968); *see also Bowling Transp., Inc. v. N.L.R.B.*, 352 F.3d 274, 281 (6th Cir. 2003). But that does not make the issue one of subject matter jurisdiction, which it is not. *Lincoln Property Co. v. Roche*, 546 U.S. 81, 90 (2005). And it does not establish that we should insert Rule 19(a) into a case whenever it occurs to us, only when it is prudent. This case, and the equally high-profile case pending in the Second Circuit, have been going on since 2005. *See Connecticut v. Spellings*, 453 F. Supp. 2d 459, 465 (D. Conn. 2006). The three affected States—Michigan, Texas and Vermont—surely know about this litigation and just as surely have made considered decisions not to join it. Indeed, it is quite possible that, even if we required the Governors of these States or the Secretaries of their respective departments of education to join the case, they still would opt not to take a position on the issue at hand. I am not sure we can make a State take a stand on the point, and I know we cannot make it take a coherent one. What we might gain from such a ruling thus is far from clear.

What is more, after the parties filed supplemental briefs before the en banc court and after the *en banc* oral argument, we *sua sponte* raised three "justiciability" questions. While the third question asked whether we should proceed in the absence of the States, we did not ask the parties to brief Rule 19—not classically thought of as a justiciability doctrine—and we still have not done so. Not surprisingly, in their supplements to the supplemental *en banc* briefs, no party—and not one of the four *amici* in their merits briefs—identified a lurking Rule 19 problem, and it remains quite possible that all of the participants in this case disagree that there is one. *Cf. Huber v. Taylor*, 532 F.3d 237, 249 (3d Cir. 2008). While no party to the case would be surprised if we resolved the case on ripeness grounds, relying in part on the absence of the States, all parties to the case (I suspect) would be surprised to see us dismiss the case under Rule 19. No doubt, had we discovered an absence of subject matter jurisdiction at this late stage of the case, we would have to dismiss the dispute, no matter how lamentable that development would be, no matter how astonished the parties would be. But I am aware of no precedent that compels us *sua sponte* to insert Rule 19 into the case at this point and to dismiss the case in its fifth year of litigation. In my view, we should answer the question of statutory interpretation that the school districts' complaint asked us to answer and leave Rule 19 out of it.

Be that as it may, Michigan, Texas and Vermont are not "required" parties under Rule 19(a)(1). An entity is a "required party" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

The first ground for treating the three States as required parties—that the court "cannot accord complete relief" without them, Fed. R. Civ. P. 19(a)(1)(A)—does not exist. The school districts seek to enjoin the Secretary "from withholding from states and school districts any federal funds . . . because of a failure to comply with the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds." Compl. at 58. Enjoining the Secretary from withholding federal funds from the school districts and the States does not require the presence of the States. It requires only the presence of the Secretary.

It also is far from clear that the three States claim the kind of "interest," Fed. R. Civ. P. 19(a)(1)(13), that is cognizable under the other two grounds for treating the States as required parties. The States do not have a legally protected interest that resolution of the *Pennhurst* question would threaten, a missing ingredient that is fatal in several circuits. *See, e.g., United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1324-25 (Fed. Cir. 2007); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 230 (3d Cir. 2005); *Makah Indian Tribe v.*

Verity, 910 F.2d 555, 558 (9th Cir. 1990). The States instead have an "interest in promoting what [they] regard[ ] as enlightened public policy," *Am. Maritime Transp., Inc.*, 870 F.2d 1559, 1562 (Fed. Cir. 1989)—namely, their vision of how the Act should be interpreted—and have an interest concerning the obligations that come with accepting funding under the Act, *see Liberty Mut. Ins. Co.*, 419 F.3d at 230 (holding "merely a financial interest" is not enough under Rule 19(a)(1)(13)). I recognize that we have not yet spoken clearly on what types of interests Rule 19 encompasses, and I see no need to take a stand today. I note only that the States' presumed "interests" in this case are a distant cry from the types of interests that normally implicate Rule 19(a)(1)(13), and that they are more reminiscent of the kinds of interests that require just notice, not mandatory joinder. *See* Fed R. Civ. P. 5.1 (requiring a party to notify the state attorney general when challenging a state law but not requiring a court to consider whether the state attorney general is a necessary party); *see also Republic of Philippines v. Pimentel*, __ U.S. __, 128 S. Ct. 2180, 2185-86, 2189 (2008) (finding the Republic of the Philippines a required party in case involving claims against the property of Ferdinand Marcos); *Minnesota v. United States*, 305 U.S. 3 82, 386-88 (1939) (condemnation dispute); *Hooper v. Wolfe*, 396 F.3d 744, 747-48 (6th Cir. 2005) (recovery of diverted assets); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1343-44, 1347 (6th Cir. 1993) (tribal fishing rights).

Even if the States have a cognizable interest, however, they are not required parties under other requirements of Rule 19(a)(1)(B). Proceeding without them will not "as a practical matter impair or impede" their ability "to protect the[ir] interest[s]."

Fed. R. Civ. P. 19(a)(1)(B)(i). When States stick their heads in the sand for nearly five years of litigation about a high-profile lawsuit, it is difficult to say that proceeding without them will impair their interests—which so far seem focused above all on *not* being forced to take a public stand on the issues presented.

Nor is there any risk of prejudice to the States if we proceed to the merits without them. *See Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2189. The matter at hand is not a challenge to the constitutionality of a state law or even to the meaning of a state law. It concerns the meaning of a federal law: Namely, did Congress satisfy the *Pennhurst* clear-statement rule by "clearly" describing "the conditions that go along with the acceptance of . . . funds" under the Act? *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006). We know that States need not invariably be parties to *Pennhurst* clear-statement cases because there are many decisions from the Supreme Court involving just a local government as a party, but not a State or even the Federal Government, including one decided a few months ago. *See, e.g., Forest Grove Sch. Dist. v. T.A.*, ___ U.S. ___, 129 S. Ct. 2484 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Arlington Cent. Sch. Dist.*, 548 U.S. 291; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Barnes v. Gorman*, 536 U.S. 181 (2002); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

The facts of this case illustrate why that often will be so. Whichever side Michigan, Texas or Vermont ultimately take on this discrete legal question, there is no reason to think that the present parties will not

protect it. Perhaps the States (silently) agree with the policy underlying the Act—that the threat of reduced federal funds is precisely the incentive that the States and school districts need to make "adequate yearly progress" in the achievement tests required under the Act. If so, there is no reason to think that the Secretary will not ably advance that position, and in fact he (and she) already has done so in the five years of litigation. Or perhaps the States (silently) side with the school districts, believing that they should not have to meet achievement test standards that they cannot reach with federal funds alone. Here, too, the school districts have ably advanced this position throughout this litigation, and they have ample incentives to continue doing so. In the end, the *Pennhurst* question at the heart of this case turns on an issue of statutory meaning, one that will not change—it cannot change—based on equitable or other considerations that a State might or might not choose to raise.

In the absence of any unprotected interests, no prejudice—not even a risk of prejudice—exists. What we have instead is a frustrating reality: How could the three States, all deeply involved in the implementation of the Act, not take a public stance on how this significant piece of legislation should be construed? Whether as intervening parties or as *amici*, the three States would have done well to offer their views. Yet whatever the explanation may be for their resounding silence, Rule 19(a) does not kick in whenever an entity *should* take a public stand in litigation; it applies only when its absence *irreparably prejudices* the entity's interests. That simply is not the case here.

The last ground for invoking Rule 19(a)(1)—subjecting an *existing* party to multiple or otherwise inconsistent obligations—also is missing. Inconsistent obligations arise only when a party cannot simultaneously comply with the orders of different courts. *See Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998); *cf. PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 201 (6th Cir. 2001). Here, the Secretary risks only a possible injunction prohibiting him from withholding federal funds if the affected school districts cannot comply with the Act due to inadequate funding. He can readily comply with this order and any subsequent order in cases involving Michigan, Texas and Vermont.

One of Judge McKeague's primary disagreements with me turns on whether we can grant "complete relief" without the States. McKeague Op. at 76-77. Because the districts must follow the Act *and* the existing plans of their respective States, he points out, those plans would have to be amended for the school districts to obtain the relief they seek. But Rule 19 does not turn on the relief that the claimants could have sought but on the relief they did seek. "Rule 19 can be utilized only to bring in parties necessary to a complete and just adjudication of the *issues presently before the court*." *Ross. v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 23 0 (5th Cir. 1983) (emphasis added); *see also Local 670, United Rubber, Cork, Linoleum and Plastic Workers of Am., AFL-CIO v. Armstrong Rubber Co.*, 822 F.2d 613, 620 (6th Cir. 1987); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1604 (3d ed. 2009). The claimants do not seek to be relieved from a specific mandate of the Act but only to enjoin the Secretary from withholding funds. That relief is not contingent on actions of the States, and it

is relief we have the power to grant. *See LaChemise Lacoste v. General Mills, Inc.*, 487 F.2d 312, 314 (3d Cir. 1973); cf. 4 James Wm. Moore et al., *Moore's Federal Practice*, § 19.03[2][d] (3d ed. 2009) ("Joinder should not be compelled when meaningful relief can be granted without the absentee.").

That the three States retain independent authority to withhold funds "[i]n order to enforce the Federal requirements" of the Act, 20 U.S.C. § 1232c(b), or perhaps impose some other form of sanction, does not change things. Rule 19(a)(1)(A) "focuses on relief between the parties and not on the speculative possibility of further litigation" or administrative proceedings "between a party and an absent person." *Sales v. Marshall*, 873 F.2d 115, 122 (6th Cir. 1989) (internal quotation marks omitted). The States have not threatened or even hinted that they would invoke their § 1232c(b) authority if the school districts won this case, and there is no indication that a State has ever invoked that authority, even though it applies to a wide variety of education programs. Under these circumstances, indeed, it is quite likely that the school districts would not have had standing to name the States as party defendants to enjoin them from this speculative, ill-defined and distant threat. Surely Rule 19(a)(1) does not require what Article III prevents.

II.

That takes me to the merits—the meaning of the No Child Left Behind Act and the nature of the obligation that the school districts and the States undertook when they accepted federal funds under the Act starting in 2002. As the school districts see it, "states and school districts that accept NCLB funding are *not* required to use their own funds for NCLB

compliance," Pontiac Supp. Br. at 12, and accordingly any "failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they are otherwise entitled under the NCLB," Compl. at 58. As the Secretary sees it, "a State's obligation to implement its plan is not contingent upon a particular appropriation of federal funds or capped at a particular level of state expenditures." Final Br. for the Appellee at 17.

A.

A few rules set the stage for deciding who is right. Congress passed the Act under the Spending Clause. U.S. Const. art. 1, § 8, cl. 1. Congress's spending authority permits it to condition the allocation of federal funds to the States on their compliance with federal regulations, including most notably regulations that Congress otherwise lacks the power to impose. *See Dole*, 483 U.S. at 207. Put another way, the Tenth Amendment, the Eleventh Amendment and the Constitution's other structural limitations on congressional authority do not limit properly enacted spending-clause legislation.

Yet other limitations constrain Congress's spending authority: two constitutional limits and a statutory one. As a constitutional matter, Congress may not impose conditions "unrelated to the federal interest" in enacting spending legislation, *id.* at 207-08 (internal quotation marks omitted), and it may not "coerc[e]" the States into accepting funds and the regulations that come with them, *id.* at 211. These restrictions, however, need not detain us here. Surely there is a legitimate connection between the Act's funding and the conditions imposed on the States who accept it. Congress did not give the States federal money for education, then insist that they move

the location of their capitals or rename their state birds. Congress asked them to meet a series of educational requirements in return for receiving education funding.

Perhaps more plausibly, the school districts' complaint could be read to include a claim that the Act is unconstitutionally "coercive," a choice-bending contract of adhesion. After all, what State in these fiscally challenging times would have the fortitude to turn down hundreds of millions of dollars in education funding? (Perhaps suggesting that there is something to the point, no State refused aid under the Act, notwithstanding the conditions that came with it.) But in their briefs in the district court and on appeal, the school districts have not claimed that they were coerced into accepting this bargain. Because they have not developed this claim in any way and because they have trained their arguments not on invalidating the Act but on limiting their responsibilities under it, they have forfeited any claim of unconstitutionality.

The statutory limitation on Congress's spending power, by contrast, lies at the core of this dispute. Given the breadth of Congress's power to impose conditions on States that accept federal money, *Arlington Cent. Sch. Dist.*, 548 U.S. at 296, given its authority under the Spending Clause to regulate the States beyond the limited and enumerated powers the Constitution otherwise gives it and given that the States are not represented in the Halls of Congress, the federal courts have required Congress to state those conditions "unambiguously" in the text of the statute, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Analogizing spending clause legislation to a contract that "requires offer and

acceptance of its terms," *Barnes v. Gorman*, 536 U.S. 181, 186 (2002), the Court has explained that Congress's authority to impose conditions on a State "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17. Just as parties to a contract "cannot knowingly accept conditions . . . which they are unable to ascertain," neither can the States. *Arlington Cent. Sch. Dist.*, 548 U.S. at 296 (internal quotation marks omitted). Spending clause conditions thus bind the States only when Congress spells them out clearly in the text of the law.

Even though this clear-statement rule has constitutional roots, it remains a rule of *statutory* interpretation, one constrained by other canons of statutory interpretation. A State or a school district cannot escape a federal regulation merely by showing *possible* ways in which a law may be unclear; it must identify a *plausible* alternative interpretation of the law consistent with its theory of ambiguity. *See Bell v. New Jersey*, 461 U.S. 773, 783 n. 8 (1983) (rejecting a reading of a statute as "no more than remotely plausible" in favor of a better reading of the law even though it imposed additional obligations on the States); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 672 (1985) (finding no ambiguity in a provision of the predecessor of the NCLB, the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, because "[n]o plausible reading of the statute or regulations suggests that" Kentucky's actions comported with the statute). A State cannot tenably complain about a congressional bait and switch when the alleged "bait" is premised on an implausible reading of the statute. As is true in other areas of the law, the implausibility of an alternative interpretation of a statute defeats a claim of threshold ambiguity.

See Auto-Owners Ins. Co. v. Redland Ins. Co., 549 F.3d 1043, 1047 (6th Cir. 2008) (insurance contract); *Zirnhelt v. Michigan Cons'l Gas Co.*, 526 F.3d 282, 287 (6th Cir. 2008) (ERISA plan); *cf. Cuomo v. Clearing House Ass'n, L.L.C.*, __ U.S. __, 129 S. Ct. 2710, 2715 (2009) (*Chevron*).

In gauging statutory ambiguity, the courts also apply a wide-angle, not a telephoto, lens. What matters is not whether a provision is ambiguous when read in isolation but whether it is ambiguous when read in context. *See, e.g., Pennhurst*, 451 U.S. at 19 (Spending Clause); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (Chevron); *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 441 (6th Cir. 2007) (contract).

B.

Measured by these yardsticks, the No Child Left Behind Act clearly requires the States (and school districts) to comply with its requirements, whether doing so requires the expenditure of state and local funds or not. A contrary interpretation is implausible and fails to account for, and effectively eviscerates, numerous components of the Act.

The basic bargain underlying the Act works like this. On the federal side, Congress offers to allocate substantial funds to the States on an annual basis—nearly $14 billion in 2008 for Title I, Part A, a 60% increase in relevant federal funding since 2001—exercising relatively little oversight over how the funds are spent. On the State side, the States agree to test all of their students on a variety of subjects and to hold themselves and their schools responsible for making adequate yearly progress in the test scores of *all* students. In broad brush strokes, the Act

thus allocates substantial federal funds to the States and school districts and gives them substantial flexibility in deciding how and where to spend the money on various educational "inputs," but in return the schools must achieve progress in meeting certain educational "outputs" as measured by the Act's testing benchmarks. As the Supreme Court recently explained:

> NCLB marked a dramatic shift in federal educational policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results. NCLB implements this approach by requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards. 20 U.S.C. § 6311(b)(2). NCLB conditions the continued receipt of funds on demonstrations of "adequate yearly progress." *Ibid.*

Horne v. Flores, __ U.S. __, 129 S. Ct. 2579, 2601 (2009). The school districts' position—that they can accept the federal dollars, spend them largely as they wish, yet exempt themselves from the Act's requirements if compliance would require any local money—undoes this bargain by nullifying some provisions of the Act and undermining several others.

Accountability. Accountability is the centerpiece of the Act, and a plausible interpretation of the legislation cannot ignore that reality. Instead of focusing on how much money school districts spend on each child or "dictating funding levels," the Act "focuses on the demonstrated progress of students through accoun-

tability reforms." *Id.* at 2603. The Act begins with a "Statement of Purpose" that drives home Congress's interest in establishing accountable public schools: "ensuring . . . high-quality academic assessments [and] accountability systems"; "holding schools, local education agencies, and States accountable for improving the academic achievement of all students"; "improving and strengthening accountability"; and "providing . . . greater responsibility for student performance." 20 U.S.C. §§ 6301(1), (4), (6), (7). *See* Appendix (containing the full Statement of Purpose).

Title I, Part A of the Act carries out this objective by requiring participating States to test their students and, over time, to establish and meet certain benchmarks in doing so. Today, the Act requires all public school students in participating States to take seventeen standardized tests over the course of their school careers, *see id.* § 6311(b)(3)(C), and requires the States to grade schools and school districts on their ability to make "adequate yearly progress" in the test results, *see id.* §§ 6311(b)(2)(B), 6316(c)(1). For those participating schools that repeatedly fail to make progress, the Act requires an escalating series of sanctions: (1) starting with "improvement," which gives students the right to transfer into more successful schools and forces schools to develop better practices; (2) moving to "corrective action," which may include a new curriculum, extended hours, or personnel discharges; and (3) ending with "restructuring," which may include discharging large portions of the staff or converting the school into a charter school. *Id.* § 6316(b); *see also id.* § 6316(c).

The Act provides limited exceptions to these accountability measures, and none of them applies here. *See, e.g., id.* §§ 6311(b)(7), 6311(c)(1),

6311(h)(2)(A)(i), 6316(b)(7)(D), 6316(c)(10)(F), 6337(e)(3). By cabining the Secretary's discretion to excuse failure, the Act furthers an essential objective—the source, indeed, of its title—that no child, whether living in inner-city school districts or not, whether suffering from learning disabilities or not, whether English is their second language or not, whether otherwise disadvantaged or not, would be left behind when it came to ensuring not just that more resources were devoted to their education but that objectively measurable progress would be made in their education. *See, e.g., id.* § 6301(3) (setting goal of "closing the achievement gap between high—and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers"). That is why the Act requires each State to set up an annual system of academic assessments in reading, science and math, *id.* § 6311(b)(3)(A), using "the same academic assessments . . . to measure the achievement of *all* children," *id.* § 6311(b)(3)(C)(i) (emphasis added), providing for "the participation in such assessments of all students," *id.* § 6311(b)(3)(C)(ix)(I) (emphasis added), and requiring "*each* local educational agency" to collect appropriate data and reports on all student achievement, *id.* at § 6311(h)(2)(B) (emphasis added).

The school districts' interpretation would break the accountability backbone of the Act. Excusing school districts from compliance with the Act whenever federal funding fell short would make it hard if not impossible to hold them accountable for meeting the Act's goals. If school districts decided they were not given enough money to test all children, they could test just some children. If school districts decided they were not given enough money to fix all under-

performing schools, they could fix just some schools. Because the school districts have alleged that virtually every major requirement of the Act is underfunded, *see* Compl. ¶¶ 32-86, their interpretation would excuse them from all of these requirements, transforming a no-exceptions accountability system into a non-existent one.

The NAACP supports the Secretary in this case, as well as in the Second Circuit case, not because it is satisfied with the levels of federal funding under the Act (few are) but because it does not want the Act's accountability measures violated with impunity—letting schools filled with disadvantaged students off the hook. NAACP Br. at 12 ("The panel's decision invites States and school districts to evade their obligations to poor and minority children."). The NAACP's concern is reflected in the Act itself, which begins by saying that the Act is designed "to ensure that *all* children . . . reach . . . proficiency on challenging State academic achievement standards and State academic assessments," "especially . . . disadvantaged" students. 20 U.S.C. § 6301 (emphasis added). With the Act's accountability system in place, these goals have a chance of success; without them, they have no chance of success, risking a return to (or a continuation of) a system of lower standards for higher-poverty schools.

Flexibility. The school districts' interpretation is inconsistent not only with the Act's accountability requirements but also with the flexibility the Act gives States and school districts in return for increased responsibility for student achievement. As the Act's Statement of Purpose makes clear, that is the central tradeoff of the Act: "providing greater decisionmaking authority and flexibility to schools

and teachers *in exchange for* greater responsibility for student performance." *id.* § 6301(7) (emphasis added); *see also Horne*, 129 S. Ct. at 2601 (the Act "reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results"). Unlike most spending programs, this one comes with few strings telling the States *how* they should comply with its conditions. Under the Act, States develop their own curricula and standards, 20 U.S.C. § 6311(b)(1), their own tests to assess whether students are meeting those standards, *id.* § 6311(b)(3), and their own definitions of progress under those standards, *id.* § 6311(b)(2)(B), so long as the progress culminates in near-universal proficiency by 2014, *id.* § 6311(b)(2)(F).

This flexibility extends to spending as well. As the school districts rightly acknowledge, the Act "provide[s] school districts with unprecedented new flexibility in their allocation of Title I funds." Final Reply Br. of Pontiac Sch. Dist. at 3 (internal quotation marks omitted). Some federal funds, to be sure, must be spent in certain ways. *See, e.g.*, 20 U.S.C. § 6303 (reserving some Title I, Part A funds for school improvement); *id.* § 6317(c)(1) (same); *id.* § 6318(a)(3)(A) (reserving some funds for parental involvement programs); *id.* § 6319(1) (reserving some funds for professional development). And the Act strictly confines the use of Title I funds to geographic areas with heavy concentrations of low—income students. *See id.* § 6313(a). But within these areas and with respect to these priority students, the Act gives States and school districts substantial flexibility in choosing how to spend the money. For instance: Section 6314 gives

school districts wide discretion to consolidate funds from various sources and to focus them on certain schools in whatever ways will improve student performance there; § 6313(b) gives school districts discretion to transfer funds between schools within certain guidelines; and § 7305b allows States and school districts to transfer up to 50% of the funds allotted to other education programs to supplement their funds under Title I, Part A.

The substantial flexibility the Act gives recipients over federal funds is surpassed by the near-complete flexibility they retain over their own funds. The only limitation is that participating States cannot reduce their own spending and offset it with federal funding but must use the Act's federal dollars to supplement, not supplant, their own. 20 U.S.C. §§ 6321, 7901. Beyond that basic requirement—a prohibition on fiscal cheating, really—the States can use their dollars however they see fit, whether for teachers or for computers or for facilities or for whatever else they think will help their students the most.

The express and unprecedented flexibility the Act gives to the States in prioritizing the spending of federal dollars—especially in Title I, Part A—cannot coexist with an interpretation of the statute that allows school districts to exempt themselves from the accountability side of the bargain whenever *their* spending choices do not generate the requisite achievement. Were the school districts correct, a State could use this flexibility to focus its federal and local resources almost exclusively on improving, say, teacher quality—a legitimate goal no doubt, but one that would allow the State to sidestep the Act's mandatory assessment requirements by contending that it lacked the funds to administer them or to make

progress under them. *Sch. Dist. of City of Pontiac v. Sec'y of United States Dep't of Educ.*, 512 F.3d 252, 284 (6th Cir. 2008) (McKeague, J. dissenting). That is not what Congress had in mind. It gave the States a clear and consequential choice: between taking the bitter (accountability) with the sweet (unprecedented flexibility in spending federal and state dollars) or leaving the money on the table.

Costs of Compliance. Not surprisingly, in view of the expansive flexibility that the Act gives States in spending federal and local funds, the Act says nothing about the bill of particulars at the heart of the school districts' complaint: the costs of complying with the Act's requirements. How could it be otherwise? The Acts' spending flexibility necessarily makes it impossible to calculate or even define the costs of complying with the Act's requirements.

The primary formula for allocating Title I, Part A grant money does not say a word about costs of compliance. *See* 20 U.S.C. §§ 6313(c), 6333(a), 6334(a), 6335(a)—(c), 6337. While the Act asks States to submit plans to the Secretary, *id.* § 6311, and asks school districts to submit plans to the States, *id.* § 6312, it does not require either entity to estimate the cost of compliance. Nor, in fulfilling their various reporting responsibilities under the Act, must the States or school districts estimate the costs of compliance. *See, e.g., id.* §§ 6311(h), 6316(a)(1)(C). If, as the Supreme Court recently explained, the Act "expressly refrains from dictating funding levels," *Horne*, 129 S. Ct. at 2603, why would Congress exempt failing school districts from the accountability requirements based on inadequate "funding levels"? The school districts have no answer.

But even if Congress wished to make costs of compliance a legitimate excuse for, say, inadequate yearly progress, how would it do so? Once Congress decided to measure accountability by educational outputs (gauged by tests scores), as opposed to educational inputs (gauged by dollars), it made objective measurements of compliance costs virtually impossible. Any effort to measure these costs surely would vary from school to school, if not from student to student, and they surely would vary from year to year. The phrase "costs of compliance" has no discernible meaning in this context, as the Act leaves it to the States, no matter how little or how much funding Congress provides, to make *discretionary cost choices* about how to make meaningful achievement—related progress.

Take a cost estimate for adding an extra hour to the school day, for lengthening the school year or for hiring more math or reading teachers—all plausible ways to improve a school's achievement scores. Each innovation has an estimable cost, to be sure. But that does not establish that the estimate would lead to the requisite progress. And if it did not, then what? Perhaps extending the school day by one more hour, extending the school year by one more week or hiring one more math or reading teacher would do the trick. But maybe not. What works for one school district might not work for another. What, indeed, works for one classroom might not work for the classroom next door, given the correlation between great teachers and great teaching—and the occasional operation of that principle in reverse. Even more discrete costs like developing and administering tests cannot be accounted for in advance given the considerable flexibility States have under the Act in implementing those requirements. Within certain general limits, a

State may develop whatever curricular standards and tests it wants. 20 U.S.C. § 6311(b). The State may use pre-existing standards that meet the Act's requirements, *id.* § 6311(b)(1)(F), or it may create new ones.

In their complaint, to use one example, the school districts say that Brandon Town School District "estimates that . . . it needed to spend $390,000 more than it received in NCLB Title I funding to ensure that the school makes [adequate yearly progress]." Compl. ¶ 65. The school district may be right, and we have no license to say that it is not at this Rule 12(b)(6) stage of the case. The issue, however, is not whether the school districts can fairly say that compliance with "adequate yearly progress" requires more federal dollars than the Secretary has allocated to them. It is whether a State could tenably think that the Act excuses non-compliance whenever a school district maintains that it has insufficient resources to make the required progress. Surely every school district could do more with more money. And if that is the case, every failing school district could do more with more federal money—and maybe enough to make adequate yearly progress. It is hard to imagine when—or, for that matter, why—a failing school would ever concede that it was getting sufficient federal funds to make such progress.

"Reflecting a growing consensus in education research that increased funding alone does not improve student achievement," the Act moves from a dollars-and-cents approach to education policy to a results-based approach that allows local schools to use substantial additional federal dollars as they see fit in tackling local educational challenges in return for meeting improvement benchmarks. *Horne*, 129 S.

Ct. at 2603 & n.17. The Act, in short, rejects a money-over-all approach to education policy, making it implausible that the heartland accountability measures of the law could be excused whenever schools, exercising their flexibility over how to spend federal and local dollars, decided they cost too much.

Express waiver authority in some areas and silence in others. Congress knew how to allow the Secretary to waive obligations under the Act, and it did so in discrete circumstances. The Act's general waiver provision allows States and school districts to seek waivers on just two grounds: that the waiver will "(i) increase the quality of instruction for students; and (ii) improve the academic achievement of students." 20 U.S.C. § 7861(b)(1)(B). Neither ground excuses schools from the accountability measures due to insufficient federal funds.

The Act also specifically describes two types of exceptions from the § 6311 accountability requirements. One applies only in case of "exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in . . . financial resources." *Id.* §§ 6311(b)(3)(C)(vii), 6311(b)(7), 6311(c)(1), 6311(h)(2)(A)(i). Not only does neither exemption turn on the sufficiency of federal funding, but one of them—the "unforeseen decline in . . . financial resources"—creates an exemption for sharp declines in local funding, which implies that the Act contemplates local spending.

The other type of exception excuses compliance if federal funding is not sufficient, but again only in limited circumstances. The Act, for instance, allows States to "suspend the administration of, but not cease the development of," annual tests if federal funding falls below certain levels. *Id.* § 6311(b)(3)(D).

Section 6311(c)(2) requires States to "participate in biennial state academic assessments of 4th and 8th grade reading and mathematics under the National Assessment of Educational Progress," but only if "the Secretary pays the costs of administering such assessments." Under the school districts' interpretation, that final qualification is unnecessary and indeed pointless. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."). Congress likewise capped a school district's costs for supplemental educational services at the amount of federal money allocated. *Id.* § 6316(e)(6). As each of these examples show, Congress knew how to excuse schools from compliance based on inadequate funding, but did so only in discrete circumstances—none of them applicable here. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

Inconsistency between the school districts' interpretation and other provisions of the Act. Besides conflicting with the hallmark features of the Act and ignoring the implications and inferences that follow from Congress's express waiver provisions in some circumstances but not in others, the school districts' interpretation conflicts with, or is at least in tension with, other provisions of the Act. The Act explicitly anticipates that funding to meet the Act's requirements will come from a variety of sources, not all federal. It requires the Secretary, for instance, to examine how States, school districts and schools have used "Federal, *State, and local educational agency funds* and resources to support schools and provide

technical assistance to *improve the achievement* of students in low-performing schools." 20 U.S.C. § 6491(a)(2)(E)(iv) (emphases added); *see also id.* § 6491(a)(2)(E)(v) (requiring a similar inquiry to determine how they have "used State educational agency and local educational funds to help [certain] schools . . . meet the requirements described in § 6319 of this title of having all teachers highly qualified not later than the end of the 2005-2006 school year"). This provision contradicts the notion that States and school districts need only meet the Act's requirements to the extent federal funds can do the trick.

Some of the Act's accountability measures apply to every school in a participating State regardless of whether the school receives any federal funding at all. *See, e.g., id.* § 6311(b)(2). Other requirements apply to every school in a school district receiving funds, whether or not the school itself receives funds. *See id.* § 6319. Yet these universal accountability requirements cannot be squared with an interpretation of the Act that demands accountability only to the extent a school receives federal funding. *See Pontiac*, 512 F.3d at 274-75 (McKeague, J., dissenting). Otherwise, an unfunded school district would have no accountability responsibilities under the Act, a notion the Act expressly contradicts.

In passing the Act, Congress also knew how to allocate funds for specific purposes—in the nature of traditional input-based funding programs. Some provisions of the Act tell the States exactly how to "use the [federal] funds." *See, e.g.*, 20 U.S.C. §§ 6313, 6362(c)(7)(A), 6372, 6381c, 6383, 6393, 7114. But these provisions make all the more conspicuous the contrast with other provisions of the Act that say

nothing about how to spend the money but mention only the accountability benchmarks the States must achieve in using it. *See, e.g., id.* §§ 6311(a), 6316(a). Congress showed that it knew how to write input-based provisions, limiting the States' responsibility to spend certain funds on discrete items, and output-based provisions, allowing the States to spend the money however they wished so long as they achieved the federal benchmarks. We should respect the reality that Congress knew how to distinguish between the two. *See BP America Prod. Co. v. Burton*, 549 U.S. 84, 92 (2006).

Ongoing implementation of the Act. If for some reason the States or school districts had any doubt about the nature of the bargain they were undertaking when they first accepted federal funds under the Act, time has cleared things up. Since 2002, when it passed the Act, Congress has made annual appropriations to the States, and each year the appropriations have not been linked to, or premised on, any effort to ascertain the funds needed to make adequate yearly progress. *See* Compl. ¶¶ 25-3 1. Yet each year the Department of Education has not wavered: The Secretary consistently has denied attempts to evade the Act's requirements due to insufficient federal funding. By the time the school districts filed this lawsuit in 2005, they plainly were on notice that there was no linkage between the appropriated federal funds and the States' duty to comply with the accountability measures. Notwithstanding that notice, the States continued to participate in the program—continued to accept the spending-legislation offer of funding, as it were, in exchange for the continued obligation to meet the Act's achievement requirements. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (States had sufficient notice of their

responsibility under Title IX because the regulations had "been on the books" for some time); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (same); *cf. Bennett*, 470 U.S. at 669 ("the fact that Title 1 [of the Elementary and Secondary Education Act of 1965] was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements"); *Brown & Williamson Tobacco*, 529 U.S. at 143 (noting in the context of *Chevron* that "[o]ver time, . . . subsequent acts can shape or focus" the initial "range of plausible meanings" that a statute may have). The Act does not permit the school districts to accept one part of the bargain and discard the other, least of all when the passage of time confirms the two sides of the bargain.

C.

Resisting this conclusion, the school districts argue that 20 U.S.C. § 7907(a), a provision that arrives on page 559 of this 674-page Act, 115 Stat. 1425, 1983, changes everything. Appearing in a section dealing with general rules under the Act, the provision reads in full:

> GENERAL PROHIBITION.—Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a). According to the school districts, the provision means that the Federal Government

may not require the States (or school districts) to spend their own money to meet the Act's requirements—that if the appropriated federal funds do not suffice to meet the accountability measures, the States are free to ignore them. That is not true—for several reasons.

First, § 7907(a) by its terms is a rule of construction, which explains how *other sections* of the Act *should not* be "construed." What the school districts urge, however, is something different—to "construe" § 7907(a) itself to create a no-unfunded-mandate exception, to use § 7907(a) to lift § 7907(a) into a sweeping exception to the Act. No one boot straps a boot strap.

Section 7907(a)'s rule of construction has no job to do here. The Act's express trade-off between local flexibility to spend federal funds and local responsibility to obtain output-based progress in doing so has no ambiguity to speak of and thus no ambiguity to be "construed." There is nothing unclear, and no shortage of detail in the 674-page piece of legislation, about this hallmark of the Act. There is no other provision of the Act—at least as far as this dispute is concerned—that calls out for ambiguity-clarifying "construe[ction]."

Second, text is context, and a reading of § 7907(a) in its immediate surroundings confirms the modest role it plays. The section merely re-enforces the flexibility that the Act gives to school districts in developing their *own* local programs and spending their *own* funds in tackling local education matters. It functions as an anti-commandeering rule of construction, nothing more. As such, it prevents the Secretary from construing the Act to "mandate" States or school districts (1) to adopt a particular "curriculum" or

"program of instruction"; (2) to "allocat[e]" state or school district resources in a particular way; or (3) "to spend any funds or incur any costs not paid for under this Act." All three limitations parallel the Act's theme of local flexibility—that the States and school districts must be permitted to make their own decisions about how to spend local resources in return for taking on the duty to make progress in a results-driven way. Thus, while the Act requires the schools to make adequate yearly progress, it does not tell them how to do so or mandate the spending of any local money to do so. If satisfying the Act's requirements takes additional money, so be it, but the Act is equally satisfied whether additional costs are incurred or not. Section 7907(a) simply fortifies the Act's focus on results over spending levels, on outputs over inputs. *See Horne*, 129 S. Ct. at 2603 (the Act "expressly refrains from dictating funding levels").

Judge Cole notes that the Federal Government cannot point to "any provision" of the Act "that explicitly spells out the States' [fiscal] obligations under this Act." That is right, but it is consistent with this feature of the Act. The Act does not tell States to *spend*; it tells them to *do*. It does not spell out fiscal obligations; it spells out performance obligations, reporting obligations, parental-involvement obligations, teacher-qualification obligations—all of which the Act makes perfectly clear through hundreds of pages of statutory text. No doubt, these performance obligations cost money, but the Act in general—and § 7907(a) in particular—leave it to the States to make these spending and allocation choices for themselves.

Third, as signaled by § 7907(a)'s appearance in a "general" set of provisions, it does not trump specific directives found elsewhere in the Act. "[I]t is a com-

monplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), and accordingly the school districts cannot leverage § 7907(a)'s "general" rule of construction to destroy the specific bargain offered to the States: the exchange of federal funds with flexibility to spend them in return for a no-excuses commitment to meeting the Act's accountability requirements. The school districts' contrary argument not only ignores this "commonplace" rule of construction but it also undermines other provisions of the Act. To ensure that the Act does not lead local schools to devote fewer local resources to education, the Act requires each participating State to preserve a level of local effort—no less than 90% of the prior year's expenditures. 20 U.S.C. §§ 6321, 7901. But if we read § 7907(a) in isolation in the manner that the school districts urge, it would bar this requirement as well—as a violation of the prohibition against mandating States to "spend any funds . . . not paid for under this" Act. The school districts correctly acknowledge that § 7907(a)'s general rule of construction does not overrule *this* specific provision, Pontiac Supp. Br. at 20, but they persist in claiming that it overrules the specific bargain at the heart of the Act. They cannot have it both ways. The specific governs the general across the board, not just in some places as opposed to others.

Pennhurst, the school districts' featured case, embraced this form of analysis, paying attention to the difference between general and specific statutory provisions. The statute at hand provided that " [p] ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities," 42 U.S.C. § 6010(1) (current version at 42 U.S.C. § 15009(a)(1)), and the question was

whether this language imposed mandatory duties or hortatory goals. After comparing the general language of § 6010 to other provisions that imposed express conditions on federal funding, the Court concluded that "[t]he existence of explicit conditions throughout the Act, and the absence of conditional language in § 6010, manifest the limited meaning of § 6010." *Pennhurst*, 451 U.S. at 23. "[A] brief comparison of the general language of § 6010 with the conditions Congress explicitly imposed on the States," the Court reasoned, "demonstrates that Congress did not intend to place either absolute or conditional obligations on the States." *Id.* at 25. The same principle applies here. What was sauce for the States in *Pennhurst* is sauce for the school districts here.

Fourth, § 7907 as a whole supports this interpretation. Labeled "Prohibitions on Federal Government and Use of Federal Funds," the section contains other provisions that *all* limit federal officials in imposing *more* conditions on the States than those mentioned in the Act. The other subsections prohibit federal officials from requiring any particular curricula, academic standards or building standards. 20 U.S.C. § 7907(b)-(d). Because words are "known by the company [they] keep[ ]," *Gustasfson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), these statutory neighbors reenforce the notion that § 7907(a) is an anti-commandeering rule of construction.

Fifth, it strains credulity to think that Congress, via a single half-sentence 559 pages into the Act, suddenly blinked, changing the hallmark bargain at the core of this legislation. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The

National Legislature "does not . . . hide elephants in mouseholes," *id.*, yet that is precisely what the school districts purport to have found hidden in § 7907(a). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

D.

Stray remarks in the legislative history and offhand comments by former Secretary of Education Rod Paige do not alter this conclusion. Various Senators and Representatives made statements for and against the Act, arguing in some places that it would impose increased costs on the States and in some places that it would not. *See Pontiac*, 512 F.3d at 269-271; *see also id.* at 282-284 (McKeague, J., dissenting). But that makes no difference. The school districts' legislative-history-based arguments about the meaning of § 7907(a) are no more plausible than their text-based ones. In either case, they ask us to embrace an interpretation of § 7907(a) that cannot be reconciled with the hallmark features of the Act. Legislative history also cannot alter the outcome in a clear-statement case. The *Pennhurst* clear-statement rule turns on textual ambiguity, not ambiguity in the legislative history. If there is textual ambiguity and a plausible state-friendly way to read the statute, that ends the matter. But if there is no such ambiguity, there is nothing for the legislative history to clarify. *See Arlington*, 548 U.S. at 304 ("In a Spending Clause case, the key is not what a majority of the Members of both Houses intended but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."); *cf. United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)

("legislative history has no bearing on the ambiguity point" in applying a clear-statement rule).

The same goes for Secretary Paige's statements, which no one claims deserve deference, whether under *Chevron* or any other doctrine. In one speech, he said that the Act "contains language that says that things that are not funded are not required," Compl. ¶ 15 (quoting Paige speech of Sept. 4, 2003), and in another speech that "if it is not funded, it's not required. There is language in the bill that prohibits requiring anything that is not paid for," *id.* (quoting Paige speech of Dec. 2, 2003). These comments, however, conflict with others in which Secretary Paige "repeatedly" emphasized that "[i]f a state decides to accept the federal funds [offered under the Act], then it's required to implement the law in its entirety." Compl. ¶ 16 (quoting Paige speech of Mar. 25, 2004). More importantly, these words conflict with the *actions* of the Department of Education, which has consistently held States accountable under the Act, whether those States are content with the level of federal funding or not. *See* Compl. ¶ 17-19 (noting the "uniform rejection of requests for waivers from the NCLB mandates based upon a lack of federal funding"). Whatever Secretary Paige meant in his comments nearly six years ago (and it is not clear that they are inconsistent with my reading of § 7907(a)), they are not binding on the Department of Education and cannot create ambiguity where none otherwise exists.

The school districts, lastly, invoke the 1984 Perkins Vocational Education Act, 20 U.S.C. §§ 2301-2471. Their chain of reasoning goes like this: § 7907(a) parallels the first part of § 2306a(a) of the Perkins Act; § 2306a(a), unlike § 7907(a), proceeds to exempt

several Perkins Act provisions requiring the expenditure of specific non-federal funds; this exemption implies that these provisions otherwise would conflict with the prohibition; because the exempted provisions require the expenditure of non-federal funds, § 2306a(a) should be read to forbid requiring the expenditure of non-federal funds except as to the specific provisions exempted, and § 7907(a) should be read the same way.

The argument proves too much. Two of the provisions excepted in the Perkins Act—those requiring that States and school districts maintain their financial effort rather than supplanting their previous spending with federal funds, 20 U.S.C. §§ 2391(a), 2413—have counterparts in No Child Left Behind as well. *See id.* §§ 6321, 7901. And although § 7907(a) includes no exceptions for these maintenance-of-effort provisions, no one, the school districts included, *see* Pontiac Supp. Br. at 20, claims that § 7907(a) nullifies the Act's maintenance-of-effort provisions. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (statutes should not be read to make any provision "a dead letter"). Better, it seems to me, to read § 7907(a) in the context of No Child Left Behind, not the Perkins Act, which was first enacted 18 years earlier and which adds nothing that supports a plausible alternative interpretation of § 7907(a).

* * * * *

Depending on whom you ask, the No Left Child Behind Act might be described in many ways: bold, ground-breaking, noble, naïve, oppressive, all of the above and more. But one thing it is not is ambiguous, at least when it comes to the central tradeoff presented to the States: accepting flexibility to spend significant federal funds in return for (largely) unfor-

giving responsibility to make progress in using them. The theme appears in one way or another in virtually every one of the Statements of Purpose of the Act, and it comes across loud and clear in the remaining 674 pages of legislation. That § 7907(a) suddenly transformed the Act into a no-strings-attached grant program, or for that matter an outright gift program, not only ignores the pages of legislation that precede it, but it also ignores the words of § 7907(a) itself and one of the eternal prerogatives of power: control follows money. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 53 n.109 (1973). Here, unlike prior education funding programs, Congress did not exercise that control by telling the schools how to spend the money but by telling them to get results with it. Time will tell whether Congress was wise to move from conditioning federal funds on "adequate" additional local funding to conditioning federal funds on "adequate" local progress. But no state official who read the Act could plausibly think that Congress intended to impose *neither* condition.

That said, I have considerable sympathy for the school districts, many of whom may well be unable to satisfy the Act's requirements in the absence of more funding and thus may face the risk of receiving still less funding in the future. Yet two Presidents of different parties have embraced the objectives of the Act and committed themselves to making it work. So have a remarkably diverse group of legislators. If adjustments should be made, there is good reason to think they will be. But, for now, it is hard to say that the judiciary will advance matters by taking the teeth out of the hallmark features of the Act. It is the political branches, not the judiciary, that must make any changes, because the Act's requirements are

clear, making them enforceable upon participating States and their school districts.

III.

For these reasons, I concur in the order affirming the district court's judgment.

APPENDIX

The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments. This purpose can be accomplished by—

(1) ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;

(2) meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;

(3) closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers;

(4) holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alterna-

tives to students in such schools to enable the students to receive a high-quality education;

(5) distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest;

(6) improving and strengthening accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged;

(7) providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance;

(8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time;

(9) promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies and challenging academic content;

(10) significantly elevating the quality of instruction by providing staff in participating schools with substantial opportunities for professional development;

(11) coordinating services under all parts of this subchapter with each other, with other educational services, and, to the extent feasible, with other agencies providing services to youth, children, and families; and

(12) affording parents substantial and meaningful opportunities to participate in the education of their children.

20 U.S.C. § 6301, Pub. L. 89-10, Title I, § 1001.

OPINION

McKEAGUE, Circuit Judge, concurring. I concur in affirming dismissal. As explained below, I believe that this case should be dismissed based on justiciability grounds, rather than the merits. One of the Secretary's longstanding positions throughout this lawsuit has been that Plaintiffs' claims are not justiciable, and I agree. The length and complexity of the No Child Left Behind Act of 2001 ("NCLB" or "Act") and the multiple and varied parts of our nation's education machinery affected by the Act warrant our pause and certainly belie Judge Cole's contention that this case is neither particularly complicated nor inherently political.

I

That said, a majority of the court sees it otherwise and has decided to reach the merits, notwithstanding both Plaintiffs' failure to seek administrative remedies and the absence of the States from any involvement in this lawsuit. Plaintiffs and the Secretary have set forth their views, albeit views that do not encompass all of the important and relevant interests. Of those expressed views, I believe that the Secretary has the sounder one on the merits of Plaintiffs' claims, as I explained in my dissenting opinion at the panel stage. *Sch. Dist. of Pontiac v. Sec'y*, 512 F.3d 252, 273-84 (6th Cir. 2008) (McKeague, J., dissenting) (vacated). Thus, assuming that this dispute is justiciable as a majority of the court has so concluded, I concur in Part II of Judge Sutton's opinion. I write separately, however, to set forth my concerns as to justiciability.

II

A. Justiciability Principles

In its most recent term, the Supreme Court stressed the need for federal courts to be "keenly mindful of [their] institutional role" under Article III of the U.S. Constitution. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009). A court should not make a broad, sweeping ruling when a narrower, more limited one will dispose of the case. *See id.* This court has been mindful of its institutional role in recent cases. *See, e.g., Connection Distrib. Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc); *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008) (en banc).

One doctrine used by courts to protect their institutional role is justiciability. In *Baker v. Carr*, the Supreme Court defined justiciability as the "[a]ppropriateness of the subject matter for judicial consideration." 369 U.S. 186, 198 (1962). The concept is distinct from jurisdiction, which calls into question whether the cause of action is a case or controversy under Article III or is otherwise "described by any jurisdictional statute." *Id.* With justiciability, "consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.*

Justiciability covers a number of related, but distinct, "constitutional limitations and prudential considerations," including exhaustion, ripeness, and standing. *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation*,

792 F.2d 782, 787 (9th Cir. 1986) (discussing *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Whether a party is required under Federal Rule of Civil Procedure 19 or is otherwise crucial for a full and just adjudication of the case also falls under the justiciability umbrella. *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1076, 1085-86 & n.34 (1 1th Cir. 1983).

In accordance with its institutional role, after oral argument the en banc court asked the parties to submit supplemental briefs addressing several questions, including the following:

> Are these claims justiciable—specifically, are they ripe for review, *see Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), have plaintiffs exhausted all administrative remedies, *see Thunder Basin Coal Co. v. Reich*, 5 10 U.S. 200 (1994), and can the court properly resolve this case without the presence of the relevant States (Michigan, Texas, and Vermont) as parties or at least without knowing the views of the States on the issues presented?

Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 676 (6th Cir. 2004) (explaining that a court can raise justiciability issues on its own motion). As explored below, exhaustion and the absence of the States are particularly important considerations in this appeal.

B. Exhaustion of Administrative Remedies

It is undisputed that Plaintiffs have not sought administrative review of any of their claims. Once approved, educational plans under the Act are not set in stone. A school district can craft an amendment to its own local plan or propose one for the statewide plan and submit the proposed amendment for review before the state department of education. *See* 20

U.S.C. §§ 6311(a)(1), (f)(1)(B), 6312(d)(3). The state department of education would review the proposal and, if the department denied it, the school district would have the right to a hearing before the department for a final, written ruling. 20 U.S.C. § 1231b-2(a). If the school district was still dissatisfied, it could appeal the ruling to the Secretary. *Id.* § 1231b-2(b). The Secretary's decision could then be challenged in federal district court under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA"), as the Secretary conceded in a similar case, *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 489 (D. Conn. 2006) ("*Connecticut I*"), as well as in the supplemental brief to this court, Appellee's Supp. Br. at 4.[1]

In its lawsuit against the Secretary, the State of Connecticut has raised several claims, including statutory and Spending-Clause claims similar to those brought by the Plaintiffs here. In *Connecticut I*, the district court, Hon. Mark R. Kravitz, set forth in detail a number of sound reasons for requiring the State of Connecticut to seek administrative review

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[1] There is a separate administrative-review process for appealing the Secretary's withholding of funds, recovery of funds, or issuance of a cease-and-desist order. *See* 20 U.S.C. §§ 1234-1234i. Under §§ 1234-1234i, a school district can challenge the punitive measure before an ALJ (complete with discovery and trial-like proceedings), subject to administrative review by the Secretary and judicial review before a federal court of appeals. 20 U.S.C. §§ 1234d(c), (f), 1234(g). This separate process is not applicable to the present lawsuit, however, as Plaintiff school districts have not been penalized by the Secretary for any improper use of federal funds, nor has the Secretary discussed this process in any of the briefs submitted here. *See Pontiac Sch. Dist.*, 512 F.3d at 260 n.2 (vacated) (noting that the Secretary had not addressed the exhaustion of administrative remedies and citing to 20 U.S.C. § 1234d).

prior to bringing its lawsuit. 453 F. Supp. 2d at 482-91.

Some of those same prudential reasons are present here. For instance, faced with a concrete proposal and specific facts, the school district, the state education department, and the Secretary would have the opportunity to craft a compromise solution that would avoid the need for a lawsuit. *See id.* at 485; *see also Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (explaining that one of the advantages of administrative review is that the objections of various parties can be worked out without the more dramatic measure of a federal lawsuit). Even if a compromise solution could not be hammered out, the parties' positions would be crystallized, providing a fuller record for judicial review as well as presenting a relatively narrow, particularized claim for relief. *Connecticut I*, 453 F. Supp. 2d at 485. This would give the school districts the opportunity to present their arguments within the context of a proposed amendment to a particular feature of the educational system, rather than as broad, sweeping claims. Moreover, the federal court would have the benefit of the Secretary's reasoning on why the proposed amendment violated federal law. *Id.* Pursuing a claim at the administrative level first would not be a hardship to school districts, as the Act sets forth a detailed process for entertaining these types of concrete claims and complaints. *See supra.*

Although the claims in Connecticut I mirror those in this case, there is at least one fundamental difference between the two cases. Here, none of the respective States are involved. Given the central role played by States under the regime created by the Act, this is

a somewhat startling omission.[2] Were this a more narrow, concrete challenge by a school district seeking an amendment to a plan and having exhausted administrative review, the absence of the States might not be a concern. However, rather than bring a particularized challenge, Plaintiffs made the strategic decision to bring a sweeping one. Consider, for instance, a couple of the "mandates" challenged in their complaint: "develop[ing] standardized tests aligned with the curriculum standards to measure the progress of public school students in meeting those standards" and "ensur[ing] that school staff (teachers and paraprofessionals) meet prescribed qualification requirements." JA 31-32. By asking for a declaration that States and schools not be "required to spend non-NCLB funds to comply with the NCLB mandates," Plaintiffs seek the authority to determine whether federal funds are sufficient to cover the costs associated with testing and staff qualifications. The breadth of their claims and of their requested relief makes Plaintiffs' lawsuit a broad challenge to the fundamental tenets of the Act itself, namely, the universal raising of student academic achievement as evidenced by testing and other accountability metrics, rather than a challenge to one or two isolated features of the Act. *See Gen. Elec. Co. v. EPA*, 360 F.3d 188, 192 (D.C. Cir. 2004). Accordingly, it must be asked whether the absence of the States

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[2] As an aside, I note that some States did participate in this lawsuit as *amici curiae*. Tellingly, however, none of the States were those with school districts involved in this lawsuit. *See Amici Curiae* Br. of the States of Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin, and the District of Columbia (filed Apr. 3, 2006); *Amicus Curiae* Br. of the Governor of the Commonwealth of Pennsylvania (filed Apr. 6, 2006).

precludes Plaintiffs from bringing this type of attack at all.

C. Federal Rule of Civil Procedure 19

Whether a person or entity must be involved in a lawsuit naturally brings to mind Federal Rule of Civil Procedure 19, *Required Joinder of Parties*. Although neither Plaintiffs nor the Secretary have cited to Rule 19 in their briefs, that provides no grounds for ignoring the rule. It is not surprising that Plaintiffs did not raise the argument, given it is one directly contrary to their position. The Secretary did, in fact, argue on several occasions that this case is not justiciable because the States are not involved in any capacity. *See, e.g.*, Appellee's Post-Argument (en banc) Br. at 8-9; Appellee's Final (panel) Br. at 31-33. In fact, during oral argument before the en banc court, counsel for the Secretary argued that this case was "less fit for review" than the *Connecticut v. Spellings* case because, unlike in that case, no State is a party here. While the Secretary chose not to present the concerns within the framework of Rule 19, the substance of the arguments is more important than the form, especially given Rule 19's focus on the weighing of equitable interests. *See infra*. Of the three justiciability questions that the court presented to the parties post-argument, the third plainly put both parties on fair notice that the court could consider their responses through the prism of Rule 19. But, even setting aside the Secretary's earlier voiced concerns and this court's notice to the parties, justiciability is first and foremost an institutional concern. A court must jealously guard its institutional role to rule only on disputes that are justiciable, including "whether protection for the right

asserted can be judicially molded." *Baker*, 369 U.S. at 198.

The States of Michigan, Texas, and Vermont have an obvious interest in the subject of this litigation because each has agreed that it and its public schools will accept federal funds under the Act and be bound by its requirements. The educational program established under Title I of the Act provides funding to the States conditioned on their developing statewide plans approved by the Secretary. The commitments made by the States in their plans are binding on themselves as well as their political subdivisions, including school districts. The States are tasked with ensuring that school districts comply with the Act and statewide plans. 20 U.S.C. § 1232c. While the school districts are themselves interested parties, have rights and duties under the Act independent of the States, and are arguably injured by the Secretary's interpretation of the unfunded-mandate provision, the absence of the States as parties is a glaring omission given their central role in the educational regime created by the Act.

It is sometimes the case that, though parties who should be involved in a lawsuit are not, the lawsuit can nonetheless continue forward in their absence. Thus, while it is beyond dispute that the States play a central role in primary and secondary education, it must be determined whether they are required parties to this lawsuit and, if so, whether the lawsuit can nonetheless proceed in their absence.

Rule 19 of the Federal Rules of Civil Procedure sets forth a three-step test for courts to use in determining whether an absent party must be joined or the case dismissed if that party cannot be joined. The first matter to consider is whether the States are

required parties under Rule 19(a). If the States are required, then the next matter is whether their joinder is feasible or if a lack of subject-matter or personal jurisdiction makes joinder impossible. Third, if joinder is not possible, the equities must be weighed pursuant to Rule 19(b) to determine if the lawsuit can continue in the States' absence or if the case should be dismissed. *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2188-89 (2008); *Hooper v. Wolfe*, 396 F.3d 744, 747 (6th Cir. 2005).

1. Required Parties

A required party under Rule 19(a) is a party whose absence prevents the court from according "complete relief among existing parties" or a party who "claims an interest relating to the subject of the action" and whose absence "as a practical matter impair[s] or impede[s] the [party's] ability to protect the interest" or "leave[s] an existing party subject to the substantial risk of . . . multiple[ ] or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1)(A), (B)(i), (ii). In essence, required parties are those "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1604 (3d ed. 2009) ("FPP") (quoting *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854)).

Plaintiffs have requested declaratory and injunctive relief for "states and school districts." JA 67. Plaintiffs do not specify whether the term "school districts" means only Plaintiff school districts or rather all school districts across Michigan, Texas,

and Vermont or even Michigan, Ohio, Kentucky, Tennessee, Texas, and Vermont. It can be inferred that they intended a broad construction, one not limited to just Plaintiff school districts, given that they have also sought relief for "states" even though neither Michigan, Texas, nor Vermont (nor any other State within the Sixth Circuit) is involved in this case.

In *Warshak*, this court found that the plaintiff's facial challenge to a provision of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2703(d), was not justiciable. 532 F.3d at 525, 534. One of the problems with plaintiff's attack identified by the court stemmed from the fact that relief was granted to persons other than the plaintiff. The court recognized, "'While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an individual suit, such broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Id.* at 531 (quoting *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003)). Plaintiffs here have not sought class-action status or fashioned this action as one brought on behalf of another person or entity. How the district court could grant the full relief requested in the complaint is a quandary that has never been explained by Plaintiffs.

It is the case that Rule 19(a)(1)(A) requires that "complete relief" be possible only "among existing parties." So, if the court ignores Plaintiffs' request for relief on behalf of nonparty school districts and States, then any relief could be limited to Plaintiff school districts. But, this leads to another quandary relevant to Rule 19(a)(1)(B): what would it mean for

the Secretary to be enjoined "from withholding from . . . school districts any federal funds to which they are entitled under the NCLB because of a failure to comply with the mandates of the NCLB that is attributable to a refusal to spend non-NCLB funds to achieve such compliance"? JA 67.

As Plaintiffs stated during oral argument before the panel, "[P]rimary responsibility to educate children rests with the States." Clearly, the States have a strong interest "relating to" the Act in general and in particular whether school districts should have the discretion to opt-out of certain programs and requirements if the federal funds in any given year are somehow deemed insufficient. Fed. R. Civ. P. 19(a)(1)(B). The Act requires that the States wield significant oversight authority vis-à-vis school districts. The federal funds at issue in this lawsuit flow through the States in accordance with their statewide plans approved by the Secretary and with the districts' own plans approved by the States. Under the statewide plans, every public school is required to make AYP and is included in the State's accountability system. The States must ensure that school districts comply with all of the requirements of the Act, as embodied in their statewide plans. Thus, if Plaintiff school districts were to be granted relief in this case, the States would necessarily fall out of compliance with their own statewide plans in order to accommodate that relief. As a result, the States would have to submit plan amendments to the Secretary seeking either to carve out exceptions for Plaintiff school districts or to make fundamental, wholesale revisions along the lines sought by those school districts, presumably then applying to all school districts within the States. Again, though, without any involvement by the States in this case, the court

can only make educated guesses about how the States would react to a favorable outcome for these Plaintiff school districts.

The States play a (if not *the*) major role in primary and secondary education within their geographic borders. They set educational priorities and direction for all of the public schools. They have a legitimate interest in the funding of education as well as the resources that must be devoted to administering and supervising compliance with their statewide plans. Even if it could be assumed that the States would desire more discretion in how they can spend federal funds, the States' absence impairs their ability to protect the viability and legality of their plans.

It is suggested that Plaintiffs and the Secretary have adequately argued the legal merits of Plaintiffs' claims and, as a result, there can be no risk of prejudice to the States' interests. That, however, is too blinkered a view of this case. Rule 19 is a "creature of equity jurisprudence" and the court must consider not only any legal prejudice, but also any practical prejudice to the States' interests. *FPP* § 1602 (citation omitted); *see also id.* § 1604 ("It should be noted that the prejudicial effect of nonjoinder referred to in [Rule 19(a)(1)(B)] may be practical rather than legal in character." (citation omitted)). The court must consider the interests of an absent person, even if that person's legal claim is "technically unaffected." *Id.* § 1602 (citation omitted).

While the court is not faced with a pure contract dispute, the Supreme Court has drawn on contract principles when resolving Spending-Clause disputes. *See, e.g., Pennhurst*, 451 U.S. at 17. It is hornbook law that all parties to a contract are necessary in an action challenging its validity or interpretation. *See,*

e.g., *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."). This lawsuit is not only missing a party, but arguably the most important party. The Secretary cannot force a State to accept federal funds under the Act. The school districts cannot accept federal funds on their own. Only the States can decide in the first instance whether, after reading the offer sheet (i.e., the Act), to accept the funds and associated requirements for the benefit of the State's public-school students. The interests of the States in this context are too myriad for a political subdivision to protect. And to think that the Secretary, the party sitting across the bargaining table, can adequately represent the States' interests in this dispute is simply not realistic.

To illustrate, let's assume for the moment that Plaintiffs are correct. Section 7907(a) releases recipients from requirements of the Act "if, and only to the extent that, federal funding falls short." Appellant's Br. at 22. The federal government cannot require recipients "to comply with the NCLB to the extent that they do not receive sufficient federal funding to do so." *Id.* at 23-24. As a result, Plaintiff school districts get an injunction permitting them to avoid compliance with a requirement of the Act to the extent that the costs associated with that requirement are somehow deemed too much.

Even if the States agree with Plaintiffs about the meaning of § 7907(a), does it necessarily follow that the States would therefore not be prejudiced by an injunction favoring these school districts? To take one

example, consider the State of Michigan. As part of its statutory provisions governing aid to schools, Michigan mandates, "A district or intermediate district shall comply with all applicable reporting requirements specified in state and federal law." MCL § 388.1619(3). It is clear from the explicit mention of the "no child left behind act of 2001" in that same section that the State had in mind the reporting requirements of the Act. *See id.* § 388.1619(1). Now, Michigan does not make provision for school districts to comply with reporting requirements specified in the Act only to the extent paid for by federal funds. If the Pontiac School District determines that it will not comply with the reporting requirements of the Act and nails the court's injunction on the doors of the Michigan Capitol building, is it really true that the legitimate interests of the State of Michigan have not been prejudiced or that those interests have been adequately protected by the Secretary?

Staying with the State of Michigan, the State requires all school districts to administer the State's merit examination to students in particular grades. Under state law, the merit examination must meet "all of the . . . requirements of the no child left behind act of 2001." MCL § 388.1704b(3)(d)(ii); *see also id.* § 388.1704b(2)(d). There is no provision in state law providing that the examination administered by a school district must satisfy the requirements of the Act only if that district deems that the amount of federal funds it receives are sufficient to cover certain costs. One of the requirements of the Act is that all students throughout the state be tested—in Michigan, this would include students of Pontiac School District. Yet, armed with an injunction from this court, could Pontiac School District refuse to participate in Michigan's merits-examination system even

though the State otherwise mandates that the system comply with the Act's requirements?

Furthermore, one issue that has come up repeatedly in this case is how to determine whether a particular requirement has been "underfunded." This is an issue that might have benefitted from some development at the administrative level in the context of a more narrow, concrete complaint or proposed plan amendment. Be that as it may, a related issue central to the practical operation of the Act under Plaintiffs' interpretation is this: which entity should have final authority to make the determination that a particular program or requirement is underfunded? The particular school district? The Secretary? *Or the State*? School districts are, after all, political subdivisions of the States. School districts are subrecipients of federal funds under the Act, while States are primary recipients of the funds. It seems at least plausible that between the two, the States would prefer that they have final authority to determine whether any program or requirement is underfunded. On the flip side, although the Act represents an unprecedented extension of federal policy into primary and secondary public education, the States remain the central players in public education by setting priorities, direction, and spending. It seems at least plausible that the States would prefer that they, rather than the Secretary, have final authority to make the determination. This is certainly an important interest of the States related to the subject matter of this case and not an issue anyone could seriously argue has been adequately addressed on behalf of the States by Plaintiffs or the Secretary.

It must be acknowledged that Plaintiffs and the Secretary have presented both of their respective positions with vigor. However, "interests" encompass more than just legal positions. The States are separate players in our nation's public-education system, or, as Plaintiffs' counsel described during oral argument, the "three-way deal" of public education. In short, it is clear that neither Plaintiffs nor the Secretary fully share or represent the interests of the States, regardless of the outcome of an interpretation of § 7907(a). Thus, the States of Michigan, Vermont, and Texas should be considered required parties under Rule 19(a)(1)(B).[3]

2. Feasibility of Joinder

The next matter to consider is whether joinder is feasible. As a sovereign, a State cannot be required by a federal court to join a lawsuit as a party except under certain circumstances not present here. *Grinter v. Knight*, 532 F.3d 567, 572 (6th Cir. 2008) ("The Eleventh Amendment bars suits brought in federal court against a state and its agencies unless the state has waived its sovereign immunity or consented to be sued in federal court."); *In re Hood*, 319 F.3d 755, 762 (6th Cir. 2003) (explaining that Congress can sometimes abrogate a State's sovereign

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[3] Despite Judge Sutton's contention that one of my "primary disagreements" with him centers "on whether we can grant 'complete relief' without the States" under Rule 19(a)(1)(A), it should be clear from the preceding analysis that my primary emphasis is that the States have important interests in the subject of this litigation that are not adequately represented by Plaintiff school districts or the Secretary, a consideration that is sufficient by itself under Rule 19(a)(1)(B) to find that the States are required parties.

immunity).[4] Because the States have not voluntarily sought to join this lawsuit, and the court cannot require that they join, the States' compulsory joinder under Rule 19 is not feasible.

3. Whether Dismissal is Proper

At the final step, Rule 19(b) requires a weighing of the equities. As this court explained in *Glancy*:

> Courts are to consider at least four factors in assessing whether the action should be dismissed, including (but not limited to), first, to what extent a judgment rendered in the person's absence might be prejudicial to the person . . .; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

373 F.3d at 672 (internal quotation marks omitted). When, however, the absent party is a sovereign, the weighing of the equities is more circumscribed. *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995). This is "because immunity may be viewed as one of those interests compelling by themselves." *Id.* (internal quotation marks omitted); *cf. Republic of the Philippines*, 128 S. Ct. at 2190 (within the

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[4] A state official can be sued in an official capacity in federal court under *Ex parte Young*, 209 U.S. 123 (1908), again, though, only under certain circumstances, including that the lawsuit not "implicate[ ] special sovereignty issues." *Idaho v. Coeur d'Arlene Tribe of Idaho*, 521 U.S. 261, 281 (1997). Plaintiffs chose not to sue any state officials in their official capacities.

Rule 19(b) context, discussing the importance of the "[c]omity and dignity interests" of a foreign sovereign).

As noted above, declaratory or injunctive relief in favor of Plaintiff school districts will undoubtedly call into question the viability and legality of the current statewide plans. Although the States will not strictly speaking be bound by the judgment, in practice the judgment will undoubtedly impact the States' plans. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) (stating that when considering the "interest of the outsider whom it would have been desirable to join," the court should consider the "practical" impact of a judgment on that interest). It is certainly plausible that Plaintiffs' position—that recipients should not have to spend their own money to pay for things mandated by the Act but not fully paid for by the federal government—would be supported by the States. In fact, the State of Vermont has enacted legislation to express that very sentiment. 2005, Adj. Sess., No. 182, § 35 ("[N]either the State nor any subdivision thereof shall be required to spend any funds or incur any costs not paid for under the Act in order to comply with the Act."). Taking a step back, though, it might very well be that some of the state officials understood that when they agreed to accept federal funds under the Act, they also agreed to use nonfederal funds to help pay for new programs, testing, etc. These officials might also have understood that were the Act read to mean what Plaintiffs contend it means, it is possible (maybe even probable) that Congress would rewrite the law with even less favorable conditions than the current version. Finally, it is also conceivable that state officials understood that meaningful improvement in the educational levels of their most disadvan-

taged students should not be left to unilateral decisions by local officials who might decide to forgo testing and assessment only after concluding that their students were not in fact making the improvement required by the Act.

The other three enumerated factors clearly weigh in favor of dismissal. Given the sweeping nature of Plaintiffs' claims, there is little room to fashion the relief in a way that would lessen the prejudice to the States (and their disadvantaged students) or otherwise lessen the impact on their plans. As to whether the relief that could be granted would be adequate, the court must consider this from the public's interest "in settling disputes by wholes" rather than from Plaintiffs' particular interest in the lawsuit. Provident, 390 U.S. at 111 ("We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them."). The relief that could be granted to Plaintiff school districts would be of little practical value by itself; subsequent changes to the statewide plans would have to be made. The fashioning of these statewide plans are complex and require considerable negotiation; they are not merely ministerial in nature. As Governor Edward G. Rendell (Pa.) explained in his amicus brief, "Educational programming and funding questions are not simply a matter of parroting what Congress has set forth in NCLB." Amicus Br. at 16. Thus, for the school districts to get any meaningful relief, they would need the States to develop changes to their statewide plans, propose those changes to the

Secretary, and negotiate with the Secretary over the appropriateness of those proposals.

As to the fourth factor, Plaintiff school districts have other remedies available to them. As discussed above, the Act allows a school district to propose a plan amendment and pursue administrative and judicial remedies pursuant to 20 U.S.C. § 1231b-2 and the APA. Nothing in this justiciability analysis would preclude Plaintiff school districts from taking this route.

While this case was filed back in 2005, it is quite young in litigation-terms. The lawsuit is still in its early stages—no answer has been filed, no discovery has been taken, and no trial has occurred. Thus, this is not the case where one party or the court waited until the eleventh hour to raise the absence of the States as a possible ground for dismissal. *See Boone v. Warren*, 166 F. App'x 818, 819-20 (6th Cir. 2006) (in weighing the equities, finding that the defendant's failure to raise the Rule 19 issue until after the jury trial was completed and judgment entered for the plaintiff weighed against dismissal). Likewise, while the failure to intervene can weigh against dismissal in the normal course, such failure is not a consideration "where intervention would require the absent party to waive sovereign immunity." *Kickapoo Tribe*, 43 F.3d at 1498.

It is also true that from the standpoint of efficiency, the court might better just plow ahead regardless of these justiciability concerns, reach the merits of Plaintiffs' legal claims, and let the chips fall where they may, as a majority of my colleagues would do. But, as this court recognized in *Warshak*, judicial efficiency must give way in the face of the type of intractable justiciability problems presented here.

532 F.3d at 533. Justiciability doctrines, such as ripeness in *Warshak* and the absence of a party here, "like all limitations on the judicial Power, prevent[ ] us from doing today what can be done tomorrow." *Id.* (internal quotation marks and brackets omitted).

Accordingly, regardless of the merits of the parties' positions, this lawsuit should be dismissed because of the absence of the States of Michigan, Texas, and Vermont. It is true, of course, that in some other cases a political subdivision like a school district has defended against a claim by raising Spending-Clause arguments similar to those of Plaintiffs', even though the respective States were not parties. *See, e.g., Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 301 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). The Court in those cases issued holdings that were not only binding on the parties, but also, for all practical purposes, binding as precedent on the respective States. Yet, those and other similar cases are distinguishable on several grounds. In those cases, the issue of whether the lawsuit should be dismissed in the absence of the State was not raised and, because the issue is not a jurisdictional one, the Court was not required to reach the matter on its own motion. *See FPP* § 1603 ("Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process." (quoting Fed. R. Civ. P. 19 advisory committee's notes (1966))). In at least one of the cases, moreover, the respective State did participate in the proceeding as amicus curiae. *See Jackson*, 544 U.S. at 169 (listing the State of Alabama as amicus curiae).

More importantly, the controversies in those and similar cases were narrower in scope than those presented in this lawsuit. *Winkelman* resolved whether parents could pursue claims under the Individuals with Disabilities Education Act ("IDEA") on their own without the assistance of legal counsel. 550 U.S. at 535. The Court specifically noted that its ruling did "not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." *Id.* at 534. In *Arlington School District*, the Court considered whether expert fees were "costs" under the IDEA and thereby recoverable under the act's fee-shifting provision. 548 U.S. at 304. Even *Jackson*, arguably the most far-reaching of the decisions listed above, involved the rather isolated question of whether recipients of federal funds could be held liable for intentional sex discrimination in the form of retaliation under Title IX. 544 U.S. at 183-84.

In contrast, Plaintiffs here pursue a challenge to the fundamental tenets of the Act itself. It cannot be seriously questioned that the Act is markedly different under the parties' respective views. According to Plaintiffs' view, after the federal government appropriates funds, after the Department of Education sets its priorities, after the States set their own priorities and spending, then someone gets to decide whether a particular program or requirement is or becomes "underfunded" and, if so, then the district need not spend any funds on that program or requirement. According to the Secretary's view, though, the federal government offers the States an all-or-nothing proposition—accept the funds and all of the duties, or go it alone without the funds or any of the duties. Every "shall" means "may," every command simply an option, funding permitting—versus—"shall" means "shall" regardless of funding. It is hard to

fathom a more divergent set of views of how a federal-funding statute is supposed to work.

This is not a case brought by a recipient or other interested party involving a concrete proposal within a specific factual context. As explained earlier, Plaintiffs could have brought that type of claim after first pursuing their administrative remedies. Having decided to go a different route, they should be confronted with the question of whether they can travel that route alone. I believe that they cannot.

D. Crucial for a Fair and Just Resolution

Even if the States were not "required" parties under Rule 19(a), dismissal of this lawsuit without reaching the merits would still be proper. A court can dismiss a case for a myriad of prudential reasons, including the absence of a party who is crucial to a fair and just resolution of the dispute but who would not fit squarely within Rule 19's framework. *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967) ("And courts may even refuse declaratory relief for the nonjoinder of interested parties who are not, technically speaking, indispensible."); *Emery v. Adams*, 179 F.2d 586, 589 (6th Cir. 1950) ("Even if [the corporation] were not an indispensible party, the court could proceed, in any event against Adams, individually, in its discretion, Rule 19, Federal Rules of Civil Procedure, 28 U.S.C.A., and it was no abuse of judicial discretion to decline to do so.").

The States' interests in the subject of this lawsuit, as well as the equitable factors weighing in favor of dismissal under Rule 19(b) set forth above, likewise weigh in favor of dismissal under general prudential principles. Furthermore, while parents are not required parties under Rule 19(a), it must be acknowl-

edged that they have little voice in the current lawsuit even though they have arguably the second most important interest in the outcome, next to their children's own interest. While parents are consulted when a school district develops a local plan, 20 U.S.C. § 6312(d)(1), the scope of that plan is narrower than a State's own plan. Were the States involved, the broader interests embodied in the statewide plans would be represented. *Id.* § 63 11 (a)(1).

It is also undisputed that, whatever the merits of the parties' respective arguments, the Act is a lengthy, intricate statutory scheme. It is much more likely that the court would arrive at the correct resolution were Plaintiffs to pursue a claim involving a proposed amendment to a plan that could be considered first at the administrative level where state and federal education officials could bring their professional expertise to bear. Alternatively, faced with a broad claim aimed directly at the meaning and operation of the Act, it can hardly be doubted that the court's decision would be aided by input from the States.

Apart from these concerns, the involvement of the school districts from Vermont and Texas poses its own unique justiciability concerns. The State of Connecticut has brought a similar case against the Secretary raising, *inter alia*, the same two legal claims at issue in the present case: (a) the unfunded mandate provision prohibits school districts and States from spending nonfederal funds on activities required under the Act but not fully paid for by the federal government; and (b) the unfunded mandate provision violates the Spending Clause. *Connecticut I*, 453 F. Supp. 2d at 480, 491. The case is now on appeal

before the Second Circuit. *Connecticut v. Duncan*, No. 08-2437 (2d Cir.).

Assume for a moment that the Second Circuit were to find in favor of the Secretary on the merits, but this court were to find in favor of Plaintiffs. As noted above, Plaintiffs have requested declaratory and injunctive relief on behalf of the States and school districts. Yet, the State of Vermont is within the geographic jurisdiction of the Second Circuit. Although not a party to the *Connecticut v. Spellings* lawsuit, a decision by the Second Circuit in favor of the Secretary would surely reverberate throughout that circuit and embolden the Secretary to continue applying his interpretation of the unfunded-mandate provision to the other States within that circuit. Thus, the State of Vermont could be faced with deciding how to reconcile contrary decisions from two federal circuits, one (the Sixth Circuit) in which a political subdivision of the State is a party to the lawsuit and the other (the Second Circuit) in which the State is geographically encompassed.

Again, though, it is possible that any relief in the present lawsuit could be strictly limited to Plaintiff school districts—i.e., they could be granted greater discretion in how they spend federal funds under the Act without also affording similar relief to the three States or any other school district within those States. Doing so would, at least at first blush, appear to avoid thrusting the State of Vermont into an intercircuit conflict. Yet, now consider the position in which the State of Vermont would find itself. Several of its school districts could unilaterally decide to forgo the programs and requirements set forth in the applicable plans and the Act, yet the remaining school districts that are nonparties to this lawsuit as

well as the State of Vermont itself would be required to comply with the mandates of the Act, as interpreted by the Secretary. And, under this scenario, the Secretary's interpretation would have the backing of the Second Circuit. Were this lawsuit to go forward and were Plaintiff school districts to be awarded relief, the State of Vermont's education system would, in effect, be balkanized by conflicting circuit decisions. Moreover, even without a similar lawsuit winding through the Fifth Circuit, the State of Texas would be in the same situation as the State of Vermont because the State of Texas is currently subject to the Secretary's interpretation of the Act. By granting relief to the Vermont and Texas school districts, the court would be requiring that those States treat some of its political subdivisions in one manner, while at the same time they would be required by the Secretary to treat other parallel subdivisions in a diametrically different manner. This balkanization of the States' educational systems undermines the dignity interest of the sovereign States. *Cf. Alden v. Maine*, 527 U.S. 706, 715 (1999) (The States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.").

Moreover, this balkanization could have serious repercussions on the delivery of education services in the affected districts. Under Plaintiffs' view of the Act, Congress relieved them from complying with the Act's requirements whenever the cost of compliance exceeds federal appropriations. However, States and school districts ultimately control the costs of compliance, not the federal government. Thus, a Plaintiff school district itself would determine whether, in its opinion, a particular program was being sufficiently funded by the federal government. The district could

then decide to spend its funds on something else because, in the district's judgment, the federal government has not fully funded that program. The parents of economically disadvantaged students, of course, have the least opportunity to choose another school for their children, a school that would fulfill the requirements of the Act. Given that the Act's programs and requirements are specifically intended to help the nation's most disadvantaged students, those left-behind students are precisely the ones to whom the Act attempts to bring long-neglected relief but who would be hurt most by that district's decision. Permitting school districts to pick-and-choose which programs they will comply with and which they will not would, as the NAACP predicted in this case, "sound the death knell for NCLB." Amicus Br. at 17.

III

Appellate courts are often required to ignore the proverbial "elephant in the room." Sometimes a party will not bring a particular claim that appears to the court to be a viable one or the party will waive an issue by failing to preserve it below. Appellate courts are bound in almost all cases to consider only the administrative or lower court record, so sometimes important factual developments can have no impact on the case's resolution. Because the rules and limitations of appellate review are fairly well established, justice is still meted out even when an otherwise viable claim, issue, or fact has to be ignored by the reviewing court.

On occasion, however, there are just too many elephants in the room to ignore. Plaintiff school districts argue that the Secretary's interpretation and implementation of the provision violates the plain

meaning of the Act as well as the U.S. Constitution's Spending Clause. While the merits of their claims raise interesting questions about the role of the various levels of government in primary and secondary education, the interpretation of a lengthy and complex statute, and the role of legislative history in cases like this, the absence of any of the States as parties creates serious justiciability concerns. Moreover, the involvement of the Texas and Vermont school districts raises serious intercircuit and intrastate problems—problems that are avoided only because the court has decided, in essence, to maintain the status quo with its judgment today. Together these realities constitute a parade of elephants that the court should not ignore or dismiss so breezily.

Accordingly, I would find Plaintiffs' claims, as presented, nonjusticiable. Inasmuch as a majority of my colleagues have seen fit to reach the merits of Plaintiffs' claims, however, I concur in the analysis set forth in Part II of Judge Sutton's opinion and concur in the judgment affirming dismissal of the claims.

OPINION

JULIA SMITH GIBBONS, Circuit Judge, concurring in part and dissenting in part. My colleagues' opinions are articulate and carefully-reasoned, but I find myself unable to join any of them in full. I concur in Judge Cole's analysis of justiciability and standing and his thoughts about Federal Rule of Civil Procedure 19. And, although Judge Sutton questions the plausibility of any of the possible interpretations of 20 U.S. C. § 7907(a) that Judge Cole discusses, I find much of Judge Cole's analysis persuasive. On the other hand, Judge Sutton's opinion correctly highlights the position of the Spending Clause analysis as a rule of statutory interpretation and logically argues that states enter the bargain offered to them under the No Child Left Behind Act ("NCLB") with the knowledge that their obligations under the statute must inevitably require use of funds in addition to the federal funds they receive. Judge Sutton's view has the strength of common sense, without much scrutiny of the precise language at issue, while Judge Cole's view carefully examines the language of the statute but overlooks the practical implications of the overall context of the NCLB scheme. While I fully appreciate that there are arguments about which approach is legally correct here, from my perspective, the difficulty in choosing between them may well stem from the procedural posture in which we find ourselves.

This case came to us on an appeal from the district court's granting of defendants' motion under Federal Rule of Procedure 12(b)(6). Plaintiffs' complaint is fifty-nine pages long. After its description of the parties, it references the statutory language on which plaintiffs rely, cites two statements by former Secre-

tary of Education Rod Paige (one from the publication Roll Call and one from a speech) that plaintiffs claim support their position, sets forth the position of the Department of Education contrary to plaintiffs' interpretation, and describes in great detail the extent to which NCLB funding has been insufficient for compliance with the statute and the nature of the requirements imposed on states and school districts by the statute. (Compl. at 11, 12, 13, 14-22.) Plaintiffs seek declaratory and injunctive relief based upon the language contained in 20 U.S.C. § 7907(a) of NCLB. They have two allegations: 1) the Secretary of Education is violating this provision by requiring school districts to expend their own funds to comply with NCLB's requirements; and 2) the failure to honor the language of the provision violates the Spending Clause of the United States Constitution. (Compl. at 4.)

Plaintiffs therefore ask for resolution of two different questions: First, what does the provision mean; and, second, if it means that states must expend their own funds to comply with NCLB, whether Congress unambiguously informed the states of this obligation. This bifurcation muddles the fact that the Spending Clause analysis is itself a canon of interpretation. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981). Thus, in looking to Congress's authority under the Spending Clause, courts are attempting to discern the meaning of the statute, in particular the contours of states' obligations. *Id.* Relying on the Spending Clause's restrictions for guidance in statutory interpretation, the Supreme Court said that it "must view the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [] funds and the obligations that go with those

funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Viewing the statutory language from the state officials' perspective, we are thus asked to determine what the statute means. *Id.* If the statutory language does not unambiguously impose obligations on the states, the Spending Clause dictates that the statute cannot be interpreted to require those obligations. In other words, the Spending Clause analysis boils down to rudimentary statutory interpretation: The statute cannot mean what it does not say.

In a sense, we are in an awkward position between two arguably meritorious opinions. First, given the overall statutory scheme that Judge Sutton describes (Op. of Sutton, J. at 48-59), NCLB does seem to require states to spend their own funds to comply with the statute's requirements. Secondly, however, the language of § 7907(a) is not clear, as Judge Cole demonstrates (Op. of Cole, J. at 26-34), and may not have provided states with clear notice—or, at the very least, plaintiffs have stated a claim to that effect. The correct answer lies in the interplay between these two views. The question is whether § 7907(a) injects so much ambiguity as to cast doubt on the meaning of the rest of the statute. Does it render the statute so unclear as to deprive states of notice of their funding obligations?

Judge Cole's opinion ably sets out the reasons that plaintiffs' allegations are sufficient to state a claim. And Judge Sutton ably gives the contrary view. I conclude that plaintiffs have stated a claim, but I differ from both Judge Cole and Judge Sutton in concluding that today is not the time for answering the question of whether a state official would clearly understand that expenditures of state funds are

required when necessary to comply with NCLB's requirements. I would stop short of giving that answer and remand the case for further proceedings.

In view of the varying opinions of my colleagues in this case, none of which find the procedural posture problematic, one may reasonably question just what additional record the district court could consider on remand that might assist in the thorny task of statutory interpretation. A couple of possibilities occur to me—this language's interpretation in other contexts and evidence of the actual understanding of the states at the outset. There may well be others.

Although the motion to dismiss considers only the allegations of the complaint, the parties' briefs in the district court and here include much discussion of legislative history. Judge Cole steers clear of reliance on legislative history, focusing on the statutory language. And Judge Sutton discounts the role of legislative history in Spending Clause analysis.[1]

Even assuming there is no useful legislative history of this statute appropriate for consideration, an assumption in which I lack entire confidence, there may be other legislative materials relevant to notice

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[1] Judge Sutton relies on Arlington to dismiss the plaintiffs' legislative history arguments. (Op. of Sutton, J. at 30.) Arlington, however, found that the legislative history was insufficient to overcome the overwhelming evidence to the contrary, particularly the unambiguous statutory text and relevant case law. 548 U.S. at 304 (concluding that regardless of the "weight this legislative history would merit in another context, it is not sufficient here . . . where everything other than the legislative history overwhelming[ly] suggests" a different conclusion). In this case, the statutory text is ambiguous, and there are no cases on point. Legislative history thus remains pertinent to our analysis.

that the court could consider. The language at issue is hardly unique and is found in a number of statutes other than NCLB. *See, e.g.*, Serve America Act of 2009, 42 U.S.C. § 12645f(a); School-To-Work Opportunities Act of 1994, 20 U.S.C. § 6234. The interpretation of § 7907 might more easily be resolved by guidance from its interpretation in these other statutes, particularly if such language has a generally understood meaning.

Apart from legislative materials, another possibility for help exists. There is nothing in the complaint about how the states in which the school districts are located actually interpreted their funding obligations under NCLB at its inception. This suit was filed several years after the enactment of NCLB and, as Judge McKeague's opinion highlights, the states are not parties. Surely, the states' actual understanding of their obligations from the outset is highly pertinent to whether they had notice.[2] Judge Sutton finds relevant the notice given to plaintiffs by the Department of Education's interpretation of NCLB subsequent to its passage. Although this notice is certainly relevant to the equities of a situation in which states want the benefit of federal funds without assuming

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[2] I note that several states have provided their views in an amicus brief: "[Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin, and the District of Columbia] understood, based on the plain language and statutory context of the Unfunded Mandates Provision, that neither states nor local school districts would be required to spend their own funds to comply with the NCLB mandates." (*Amicus* Br. of the States of Conn., Del., Ill., Me., N.M., Okla., Wis., D.C. at 2.) Submission of evidence by the parties as to the states' understanding could shed light on the actual notice states were given.

the obligations that accompany them,[3] it would seem much more pertinent to the notice issue to know what state officials thought from the outset. *See Arlington*, 548 U.S. at 296. Particularly illuminating is not only what the relevant state officials understood the language to mean when they agreed to the terms of NCLB, but also what they understood the identical language in the School-to-Work Act to mean when agreeing to its terms in 1994.

I conclude that the allegations of the plaintiffs' complaint are at least sufficient to state a claim. Consequently, I would reverse the grant of the motion to dismiss and remand for further proceedings. Doubtless, these further proceedings will include more motions and, we may hope, more help in interpreting the statute when a court is next called upon to determine the notice issue.

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[3] As an aside, it also seems odd to discount legislative history in favor of looking only at the statutory language but then to supplement the statutory language with post-passage conduct by the executive department charged with implementation of the statute, as Judge Sutton does. (Op. of Sutton, J. at 63-64.)

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(2)

Supreme Court, U.S.
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No. 09-852

In the Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, ET AL., PETITIONERS

v.

ARNE DUNCAN, SECRETARY OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the States and their local educational agencies must fulfill the commitments they make to secure federal grants under Title I, Part A of the No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq.*, when federal funds do not cover the full costs of compliance.

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In the Supreme Court of the United States

No. 09-852

SCHOOL DISTRICT OF THE CITY OF PONTIAC, ET AL., PETITIONERS

v.

ARNE DUNCAN, SECRETARY OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 10a-74a, 78a-201a) are reported at 512 F.3d 253 and 585 F.3d 253. The decision of the district court (Pet. App. 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2009. The petition for a writ of certiorari was filed on January 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The No Child Left Behind Act of 2001 (NCLB or Act), 20 U.S.C. 6301 *et seq.*, was a comprehensive reform

of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 103-382, 108 Stat. 3519, the federal spending program that provides funds to assist the States and their local educational agencies (LEAs) in the education of elementary and secondary school children. Title I, Part A of the ESEA, as amended by NCLB (Title I of NCLB), which is at issue in this case, provides federal grants to assist States and LEAs in efforts to improve the academic achievement of disadvantaged students, and to "ensur[e] that *all* students * * * meet high academic standards." H.R. Rep. No. 63, 107th Cong., 1st Sess. Pt. 1, at 281 (2001) (emphasis added). Participation is voluntary, but a State or LEA that chooses to participate in the program must comply with the statutory requirements. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985).

As this Court has recognized, "NCLB mark[s] a dramatic shift in federal education policy," *Horne* v. *Flores*, 129 S. Ct. 2579, 2601 (2009), in that it seeks to improve the academic achievement of disadvantaged students through a combination of flexibility and accountability. The Act "expressly refrains from dictating funding levels," *id.* at 2603, and instead "grants States and [LEAs] unprecedented flexibility to target federal dollars to meet State and local priorities," H.R. Rep. No. 63, *supra*, at 362. The Act does not require States or LEAs to implement specific curricula or methods of instruction. Instead, it allows participating States to set their own academic standards, 20 U.S.C. 6311(b)(1), to design their own assessments to measure student progress on those standards, 20 U.S.C. 6311(b)(3), and to decide what constitutes "adequate yearly progress" for their schoolchildren, 20 U.S.C. 6311(b)(2)(C).

This approach "reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results." *Horne*, 129 S. Ct. at 2601. The Act focuses not on dollars and cents, but on improvement in the academic achievement of all of the State's public school students. See *id.* at 2603 (NCLB "focuses on the demonstrated progress of students through accountability reforms.").

A State that wishes to obtain federal funds under Title I of NCLB must submit a plan to the Secretary of Education stating that it will comply with all applicable requirements of the Act. 20 U.S.C. 6311(a). An LEA may, in turn, receive a subgrant by filing a plan with its State and obtaining approval from the state educational agency. 20 U.S.C. 6312(a). School districts and schools that do not receive Title I funds need not comply with certain of the Act's requirements. See, *e.g.*, 20 U.S.C. 6311(h)(2)(A) (not required to publish test results); 20 U.S.C. 6311(b)(2)(A)(ii) (not subject to certain statutory remedial measures). They are, however, required to test their students using the statewide assessments that are aligned with the established statewide academic standards. See 20 U.S.C. 6311(b)(1)(B) and (3)(A).

The Secretary of Education is vested with authority to enforce NCLB, and may withhold funds or take other enforcement action if a State fails to comply with the requirements of the Act. 20 U.S.C. 1234c.

2. Petitioners are nine school districts located in three States—Michigan, Texas, and Vermont—that have

elected to participate in the Title I, Part A program.[1] Petitioner school districts are joined by the National Education Association (NEA) and several NEA affiliates. None of the petitioner school districts' respective States have joined this litigation, and no State is before this Court.

In 2005, petitioners filed suit against the Secretary of Education alleging, based on 20 U.S.C. 7907(a) (Section 9527(a) of NCLB), that NCLB does not require States and LEAs that accept federal funds under Title I to comply with the statutory requirements of the Act if those funds do not cover the full costs of compliance. Pet. App. 2a. Petitioners alleged, in the alternative, that the Act is ambiguous in this respect and, accordingly, the Secretary could not require States and LEAs to expend state and local funds without violating the Spending Clause. *Id.* at 2a-3a. Section 7907(a), on which petitioners rely, is one of the ESEA's general provisions contained in Title IX of the Act. It states:

> Nothing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this [Act].

20 U.S.C. 7907(a).

Petitioners did not seek administrative review before filing this lawsuit. They did not ask their respective

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[1] Petitioner Otter Valley Union High School District receives no Title I funds based on a decision to use Otter Valley's funds to benefit elementary schools rather than high schools. See Gov't C.A. Post-Argument En Banc Br. 6-7.

States to propose an amendment to the State plan, nor did they propose an amendment to their LEA plans on file with the State. Instead, they asked the district court for declaratory and injunctive relief. Pet. App. 4a-5a. Respondent moved to dismiss petitioners' claims for lack of standing and for failure to state a claim. *Id.* at 5a.

The district court concluded that, at least at the pleading stage, petitioners had sufficiently alleged standing. Pet. App. 6a-7a. The court, however, rejected petitioners' argument on the meaning of Section 7907(a) and dismissed the complaint. *Id.* at 7a-9a. The court explained that Section 7907(a) restricts the ability of agency officials to add to the statutory conditions on receipt of federal funds, but it does not excuse noncompliance with the statutory conditions themselves or guarantee that Congress will reimburse States for all costs incurred in complying with the Act. *Id.* at 8a-9a.

3. In a split decision, a panel of the court of appeals reversed. Pet. App. 10a-74a. The panel majority agreed, as a threshold matter, that petitioners had standing based on allegations that petitioner school districts had already spent and will continue to spend state and local funds to comply with NCLB. *Id.* at 20a-25a.

On the merits, the panel majority observed that States must have clear notice of their obligations under federal spending programs, Pet. App. 26a-32a, and recognized that NCLB puts States "on clear notice" of their obligations to "fulfill [NCLB's] various educational and accountability requirements, such as submitting plans to the Secretary, effectively tracking student achievement, and so forth," *id.* at 42a. Nonetheless, the majority concluded that Section 7907(a) creates an ambiguity as to whether a State, "if it chooses to participate, will have to pay for whatever additional costs of implementing the

Act that are not covered by the federal funding provided for under the Act." *Id.* at 32a. While acknowledging that the Secretary's interpretation of Section 7907(a) may be "correct," the majority concluded that "a state official could plausibly contend that she understood" that provision to mean that "her State need not comply with NCLB requirements for which federal funding falls short." *Id.* at 32a-33a.

In his dissent, Judge McKeague found no ambiguity in the statutory scheme. Pet. App. 52a-53a. He observed that in "determining whether the clear-statement rule is satisfied, a court must not let itself focus myopically on one phrase or provision." *Id.* at 64a. Petitioners' argument, he explained, would allow a State (or LEA) to "divert federal funds *away* from [a failing] program, declare the program 'under funded,' and wipe their hands (but not pay back the federal dollars)." *Id.* at 73a. Judge McKeague concluded that it would "defy] commonsense to suggest that Congress intended to relieve States and school districts from compliance with the NCLB's requirements when the cost of compliance—which Congress does not control—exceeds appropriations." *Id.* at 57a. And he further found it "nonsensical" that States would believe "Congress intended to pay in full for a testing and reporting regime of indeterminate cost, designed and implemented by States and school districts, not federal agencies." *Id.* at 59a.

4. The court of appeals granted rehearing en banc, and affirmed the judgment of the district court by order of an evenly divided court. Pet. App. 78a-79a.

a. Judge McKeague, joined by Judges Rogers and Griffin, concluded that the case is not justiciable. Pet. App. 168a-194a. Judge McKeague explained that although the States of Michigan, Texas, and Vermont

"have an obvious interest in the subject of this litigation because each has agreed that it and its public schools will accept federal funds under the Act and be bound by its requirements," *id.* at 175a, they are not parties to this action. He explained further that while "the absence of the States might not be a concern" if "this [were] a more narrow, concrete challenge by a school district seeking an amendment to a plan and having exhausted administrative review," petitioners had "made the strategic decision to bring a sweeping" challenge to NCLB. *Id.* at 173a. Looking to Federal Rule of Civil Procedure 19, Judge McKeague concluded (Pet. App. 176a-183a) that the States were "required parties" because "[o]nly the State can decide in the first instance whether * * * to accept the funds and associated requirements for the benefit of the State's public-school students," *id.* at 180a, because the States might prefer to "have final authority to determine whether any program or requirement is underfunded," *id.* at 182a, and because the declaratory and injunctive relief petitioners seek would call into question the validity and enforceability of statewide plans, *id.* at 180a-182a. Even if not strictly "required" parties, Judge McKeague concluded that dismissal would be appropriate for prudential reasons because, given the absence of the States as parties, the inclusion of school districts outside the Sixth Circuit, and the presentation of a sweeping claim without the benefit of administrative review, "there are just too many elephants in the room." *Id.* at 190a-195a.[2]

b. Judge Sutton, joined by Chief Judge Batchelder, Judges Boggs, Cook, and Kethledge, and Judge Mc-

[2] Because a majority of the en banc court concluded that the case is justiciable, Judge McKeague also addressed the merits and concurred in Part II of Judge Sutton's opinion. Pet. App. 168a.

Keague in relevant part, decided that the case is justiciable, Pet. App. 127a-137a, but rejected petitioners' argument on its merits, *id.* at 137a-165a. Judge Sutton recognized that under this Court's precedents, including *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), "Spending clause conditions * * * bind the States only when Congress spells them out clearly in the text of the law." Pet. App. 140a. But he also recognized that, under the same case law, "[w]hat matters" is whether a provision "is ambiguous when read in context," and that "the implausibility of an alternative interpretation of a statute" does not give rise to ambiguity that would deprive a State of clear notice. *Id.* at 140a-141a. "Measured by these yardsticks," Judge Sutton concluded that NCLB "clearly requires the States (and school districts) to comply with its requirements, whether doing so requires the expenditure of state and local funds or not." *Id.* at 141a. He further concluded that Section 7907(a) is a "rule of construction" that prevents agency officials from depriving States of the flexibility afforded under the Act. *Id.* at 155a-160a.

Judge Sutton rejected petitioners' contrary reading of Section 7907(a) as inconsistent with the Act's accountability requirements (Pet. App. 142a-145a), with the flexibility given to States and LEAs (*id.* at 145a-148a), with the focus on results rather than costs of compliance (*id.* at 149a-151a), and with other provisions of the Act (*id.* at 152a-154a). He concluded that "[t]he express and unprecedented flexibility the Act gives to the States * * * cannot coexist with an interpretation of the statute that allows school districts to exempt themselves from the accountability side of the bargain whenever *their* spending choices do not generate the requisite achievement." *Id.* at 147a. Indeed, he observed, the

Act's "spending flexibility necessarily makes it impossible to calculate or even define the costs of complying with the Act's requirements." *Id.* at 148a. Judge Sutton also found that, to the extent there was any ambiguity when the Act was passed in 2002, the States and the petitioner school districts were clearly on notice of the conditions of participation by the time they filed this lawsuit in 2005, yet they continued to accept federal dollars each year. *Id.* at 154a-155a.

In the end, Judge Sutton rejected the notion that Section 7907(a) "suddenly transformed the Act into a no-strings-attached grant program, or for that matter an outright gift program," and held that "no state official who read the Act could plausibly think" otherwise. Pet. App. 163a.

c. Judge Cole, joined by Judges Martin, Daughtrey, Moore, Clay, Gilman, and White, concluded that the case is justiciable, Pet. App. 90a-112a, and that petitioners' complaint should not have been dismissed for failure to state a claim, *id.* at 112a-126a. Judge Cole acknowledged that a State that elects to accept federal funds "must comply with NCLB requirements," and did not question the clarity of the statutory testing and other accountability requirements. *Id.* at 84a-87a. He also recognized that Section 7907(a) could be understood as "limiting agency authority in administering NCLB," *id.* at 115a, rather than excusing noncompliance with the statutory requirements themselves, *id.* at 113a. He ultimately concluded, however, that "a state official would not clearly understand that accepting federal NCLB funds meant agreeing to use state and local funds to meet goals rendered otherwise unreachable by deficient federal funding." *Ibid.* Judge Cole indicated that he would remand for further proceedings to apply his un-

derstanding of the statutory scheme to petitioners' factual circumstances. *Id.* at 126a.[3]

ARGUMENT

Petitioners renew their argument that the States lacked clear notice that if they accepted federal funds under Title I of NCLB, they would be required to comply with the statutory conditions even if compliance would require the expenditure of state or local funds. This is not a proper vehicle to review that proposition because this case does not present a properly justiciable controversy. In any event, petitioners' argument fails on its merits, and the decision below does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has decided this issue in the eight years since NCLB was first enacted, and the judgment of the court of appeals in this case—affirming the district court's judgment by an equally divided court—presumably would not be regarded as binding precedent even in the Sixth Circuit. Further review of the decision below is not warranted.

1. This case is not a proper vehicle to review the question presented because it does not present a properly justiciable controversy. Petitioners assert an abstract and sweeping challenge to NCLB, and they do so without the participation of their respective States. There are simply "too many elephants in the room," Pet. App. 194a, to make this a suitable vehicle for review.

First, petitioners assert broadly that the costs of compliance "far exceed" the federal funding, ask for "an order declaring that states and school districts are not required to spend non-NCLB funds to comply with the

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[3] Judge Gibbons wrote separately, indicating that she would remand for further record development. Pet. App. 196a-201a.

NCLB mandates," and seek an injunction precluding the United States Department of Education from withholding funds "from states and school districts" if their failure to comply "is attributable to a refusal to spend non-NCLB funds to achieve such compliance." Pet. App. 3a-5a. But petitioner school districts did not propose an amendment to their own plans that would relieve them of particular obligations they claim are "underfunded," nor did they ask their respective States to propose such an amendment to the statewide plan. See *id.* at 170a-172a, 187a. The "costs of compliance" are neither dictated by Congress nor identified by the States or LEAs in their respective plans. Without some factual development in connection with a concrete submission, and some understanding of what it would mean for an LEA to unilaterally identify which obligations are "underfunded," the legal question presented has such an abstract quality that it would be exceedingly difficult for a court to arrive at the "correct resolution." *Id.* at 191a; see *id.* at 149a ("Once Congress decided to measure accountability by educational outputs (gauged by test scores), as opposed to educational inputs (gauged by dollars), it made objective measurements of compliance costs virtually impossible."); *id.* at 182a (noting that "one issue that has come up repeatedly in this case is how to determine whether a particular requirement has been 'underfunded[,]' * * * an issue that might have benefitted from some development at the administrative level").

Second, "[a] more narrow, concrete challenge by a school district seeking an amendment to a plan and having exhausted administrative review," Pet. App. 173a, would have had the added benefit of providing the school district's State with an opportunity to consider the dis-

trict's proposal and address factual issues in the first instance. The federal spending program in this case offers federal financial assistance to States, conditioned on agreements made by the States to comply with the statutory requirements. See *id.* at 180a ("Only the States can decide in the first instance whether, after reading the offer sheet (*i.e.*, the Act), to accept the funds and associated requirements for the benefit of the State's public-school students."); see also 20 U.S.C. 6311. The commitments made by the State bind its LEAs, and it is the State's responsibility to ensure that its LEAs comply with the statutory requirements as embodied in the State plan. 20 U.S.C. 1232c, 7844(a)(1) and (a)(3); 34 C.F.R. 80.40.

The States of Michigan, Texas, and Vermont have elected to participate in the Title I, Part A program, and each has a plan on file with the United States Department of Education. Each year, these States are informed of the annual allotment of federal funds and, after receiving that information, each has determined that receipt of such funds warrants continued participation in the program. The States of Michigan, Texas, and Vermont "have an obvious interest in the subject of this litigation because each has agreed that it and its public schools will accept federal funds under the Act and be bound by its requirements." Pet. App. 175a. The relief that petitioners seek would "undoubtedly call into question the viability and legality of the current statewide plans." *Id.* at 185a; see *id.* at 100a (acknowledging that "statewide plans" "may need to be amended following the disposition of this case").

At bottom, petitioners argue that "after the federal government appropriates funds, after the Department of Education sets its priorities, after the States set their

own priorities and spending, then someone gets to decide whether a particular program or requirement is or becomes 'underfunded' and, if so, then the district need not spend any funds on that program or requirement." Pet. App. 189a. Whether or not the courts below should have dismissed this case on justiciability grounds, this Court should not address the meaning of important federal spending legislation at this level of abstraction without the participation of the responsible States and submission of concrete proposals for administrative review.

2. In any event, petitioners' argument fails on its merits, and the order affirming the judgment of dismissal does not conflict with any decision of this Court or any other court of appeals. Indeed, even though every State has accepted federal funds under NCLB on an annual basis since its passage in 2002, no other court has decided the question presented.[4] Further review of the decision below is not warranted.

a. Petitioners' argument rests entirely on 20 U.S.C. 7907(a), which appears in Title IX of the Act and provides that "[n]othing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any

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[4] The State of Connecticut raised a similar claim, but the district court dismissed that claim as non-justiciable because the State failed to present the Spending Clause challenge to the Secretary in the context of a proposed amendment to the State plan. See *Connecticut* v. *Spellings*, 549 F. Supp. 2d 161, 179-180 (D. Conn. 2008). An appeal in that case is currently pending before the Second Circuit. See *Connecticut* v. *Duncan*, No. 08-2437 (argued Sept. 17, 2009).

funds or incur any costs not paid for under [the Act]." Petitioners contend that the second clause of this provision means that "States and school districts should *not* be obligated to divert their own funds to meet all of the Federal Government's NCLB educational priorities." Pet. 30. Contrary to petitioners' assertion, the language and structure of the Act as a whole leave no doubt that the States were well aware when accepting federal funds year after year that such was not Congress's intent.

As Judge Sutton explained (Pet. App. 156a-157a), Section 7907(a) does not excuse noncompliance with the statutory conditions themselves; it limits the discretionary authority of the United States Department of Education to micro-manage a State's educational program by mandating specific actions (such as curriculum or staffing requirements) or specific expenditures (such as per pupil spending, teacher salaries, or the purchase of equipment) not paid for under the Act. See *id.* at 115a (opinion of Cole, J.) (acknowledging that "Congress may have intended to prohibit the expansion of any of the requirements under NCLB to micro-manage state officials in any way not expressly provided for under NCLB."). This interpretation is buttressed by the location of the provision within the Act. As Judge Sutton noted (*id.* at 159a) and Judge Cole acknowledged (*id.* at 114a-115a), Section 7909(a) is included alongside a series of other ESEA provisions that indisputably define the scope of agency authority. See, *e.g.*, 20 U.S.C. 7906(b)(1) (Department may not use funds to endorse a particular curriculum); 20 U.S.C. 7910(b) (Secretary may not withhold funds on the basis of a failure to adopt a specific method of teacher or paraprofessional certification). Moreover, Title I has its own federal mandates provision, which conspicuously omits the language upon

which petitioners' submission rests. Compare 20 U.S.C. 6575 with 20 U.S.C. 7907(a).

In arguing, from the single clause in Title IX, that the States understood that they had license to accept federal funds and then unilaterally decide not to comply with whatever obligations they determine are "underfunded," petitioners fundamentally misunderstand the statutory scheme and misapprehend Congress's obligation to provide fair notice.

Contrary to petitioners' assertion (Pet. 4), there are no "federally mandated compliance costs." In enacting NCLB, Congress did not tell participating States and LEAs to administer Test X, or to spend Y dollars on testing; it told States that if they wanted to participate in the federal program, they should craft a statewide plan that would "define performance standards and * * * make regular assessments of progress toward the attainment of those standards." See *Horne* v. *Flores*, 129 S. Ct. 2579, 2601 (2009); *id.* at 2603 ("NCLB expressly refrains from dictating funding levels."). "[T]he Act moves from a dollars-and-cents approach to education policy to a results-based approach that allows local schools to use substantial additional federal dollars as they see fit in tackling local educational challenges in return for meeting improved benchmarks." Pet. App. 150a; see H.R. Rep. No. 63, *supra*, at 362 (The Act "grants States and [LEAs] unprecedented flexibility to target federal dollars to meet State and local priorities."). Because each State retains control over its "costs of compliance," Pet. App. 148a-149a, it is inconceivable that States would believe that the Act allows LEAs "to exempt themselves from the accountability side of the bargain whenever *their* spending choices do not generate the requisite achievement," *id.* at 147a.

Indeed, petitioners' interpretation would allow a State or school district to target, for example, much of its resources at improving teacher quality, and then evade NCLB's mandatory assessment requirements by contending that it lacks sufficient funds to administer assessments. Or, if "school districts decided they were not given enough money to test all children, they could test just some children." See Pet. App. 144a-145a. That is not a plausible reading of the statutory framework. See *id.* at 140a ("rejecting a reading of a statute as 'no more than remotely plausible' in favor of a better reading of the law even though it imposed additional obligations on the States") (quoting *Bell* v. *New Jersey*, 461 U.S. 773, 783 n.3 (1983)).

Congress knew how to make a State's obligations under the Act contingent upon specified levels of federal funding. And in the limited instances in which Congress intended to do so, it said so explicitly. "The Act, for instance, allows States to 'suspend the administration of, but not cease the development of,' annual tests if federal funding falls below certain levels." Pet. App. 151a (quoting 20 U.S.C. 6311(b)(3)(D)). Another provision "requires States to 'participate in biennial state academic assessments of 4th and 8th grade reading and mathematics under the National Assessment of Educational Progress,' but only if 'the Secretary pays the costs of administering such assessments.'" *Id.* at 152a (quoting 20 U.S.C. 6311(c)(2)). In contrast, Congress imposed certain testing obligations on *all* school districts and schools in participating States, regardless of whether the individual school district or school received any Title I funds. See p. 3, *supra*. In light of this statutory structure, the States were on clear notice that statutory obligations *not* defined in terms of expenditures must be

complied with, and that such compliance would not be excused simply because the expenditure of state or local funds turned out to be necessary. Inclusion of a single clause in a general provision in Title IX serving other purposes does not compel a different result.

b. Petitioners nonetheless assert (Pet. 23) that the reasoning of Judge Sutton's opinion is inconsistent with *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006) (*Arlington*). *Arlington* reiterates the general principles articulated in this Court's previous Spending Clause cases and applies them to a statutory provision that is distinguishable from the provision upon which petitioners rely in this case. There is no conflict.

In *Arlington*, this Court explained that, under the Spending Clause, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 7 (1981) (*Pennhurst*)). Using the ordinary tools of statutory interpretation, the Court held that the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, does not allow prevailing parties to recover fees for services rendered by experts. *Arlington*, 548 U.S. at 296-304. The Court explained that IDEA's plain terms "overwhelmingly support the conclusion that prevailing parents may not recover the cost of experts or consultants." *Id.* at 300. The Court further explained that its prior precedents "confirm[ed] even more dramatically that the IDEA does not authorize an award of expert fees." *Id.* at 301. And it concluded that, "in the face of the unambiguous text of the IDEA and the reasoning in [its prior decisions], [it could not] say that the legislative history

on which respondents rely is sufficient to provide the requisite fair notice." *Id.* at 304.

Judge Sutton recognized and applied the rule, reiterated in *Arlington*, that Congress must state the conditions of participation in a federal spending program "unambiguously in the text of the statute." Pet. App. 139a (internal quotation marks and citation omitted). But he also recognized, consistent with this Court's precedents, that the traditional tools of statutory interpretation apply and that an "implausible" alternative reading does not deprive a participating State of fair notice. *Id.* at 140a-141a. Applying "these yardsticks," *id.* at 141a, he concluded that the States were on notice that they had to comply with the clearly delineated statutory obligations even if doing so required the expenditure of state or local funds. Unlike in *Arlington*, where the statute's "terms" and this Court's precedents "overwhelmingly support[ed]" the school district's interpretation, 548 U.S. at 300-301, here even Judge Cole recognized that the Secretary's reading may well be the "correct" one, Pet. App. 33a. Cf. *Pennhurst*, 451 U.S. at 24 (finding that the plaintiff's interpretation "defies common sense"). For the reasons set forth above and explained further by Judge Sutton (Pet. App. 141a-164a), the Act provided participating States with clear notice that if they wanted to participate in the funding program, they had to comply with the statutory obligations— regardless of the precise level of federal funding available.

This case differs from *Arlington* in another crucial respect: "Title I [is] an ongoing, cooperative program," and, accordingly, "grant recipients ha[ve] an opportunity to seek clarification of the program requirements." *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). To the extent any confusion remained after the

Act's passage, the program requirements were crystal clear when petitioners filed this suit. Petitioners are quite wrong when they assert that "a State that chooses to participate in the NCLB program has no way of knowing how 'substantial' the Federal funds will prove to be." Pet. 24. To the contrary, each year the States are informed of their annual funding allotments under NCLB programs. See 20 U.S.C. 6333-6336; Gov't En Banc Supp. C.A. Br. 3. And, knowing that compliance would not be excused if those federal funds proved insufficient to cover the full costs of complying with certain requirements, each State voluntarily accepted those federal funds. Thus, the hypothetical "zero to one hundred percent" of funding provided by the federal government is not the black box petitioners posit. See Pet. 28; see also Pet. 24 (suggesting States would be forced to comply with statutory obligations without knowing whether the federal funds will be "remotely sufficient"). Nothing in *Arlington* or this Court's other Spending Clause jurisprudence suggests that a State can accept federal funds with full knowledge that they are insufficient to cover all of its statutory obligations, promise to abide by those obligations, and then refuse to do so because the funds are insufficient.

c. The decision below does not conflict with any decision of another court of appeals, and petitioners do not contend otherwise. Cf. *Arlington*, 548 U.S. at 295 (granting certiorari "to resolve the conflict among the Circuits"). Indeed, since NCLB was enacted in 2002, no other court has addressed the question presented here, and the judgment of the court of appeals in this case —affirming the district court's judgment by an equally divided court, see Pet. App. 78a-79a— presumably would not be regarded as binding precedent even in the Sixth

Circuit. See *Stupak-Thrall* v. *United States*, 89 F.3d 1269, 1269 (6th Cir. 1996) (Moore, J., concurring in the order), cert. denied, 519 U.S. 1090 (1997); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 215 n.1 (1995); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1869). Only one other case has raised this question, and it was dismissed by the district court on justiciability grounds. See *Connecticut* v. *Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008), appeal pending, No. 08-2437 (2d Cir. argued Sept. 17, 2009). And in the intervening eight years, all States have opted to participate in the federal program year after year—*after* learning of the federal funds allocated. This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Petitioners,

v.

ARNE DUNCAN, SECRETARY OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

Section 9527(a) of the No Child Left Behind Act, 20 U.S.C. § 7907(a) ("Section 7907(a)"), provides that the Federal government shall not "mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." Yet, in the proceedings below and in its brief in opposition ("Opp."), the Respondent Secretary of Education ("Secretary") has taken the position that whether a compliance cost was or was not "*paid for* under th[e] Act" is of no consequence, as long as the cost was incurred to comply with requirements that are otherwise *authorized* by the Act.

Because the Federal Government has failed to adequately fund the programs required by the

NCLB—with the amounts appropriated having fallen short of the levels Congress authorized when it enacted the statute by tens of billions of dollars, *see* Petition at 7-8—the consequence of the Secretary's position has been to require States and school districts to divert scarce resources to pay for compliance costs that the Federal Government has "not paid for under th[e] Act," at the expense of the programs to which those State and local funds would otherwise be directed.

Of the thirteen members of the Sixth Circuit who reached the merits of the question presented here, seven rejected the Secretary's position. Rather than see this Court resolve the uncertainty that now prevails on a question that is central to the administration of this nation's principal federal education statute, the Secretary seeks to keep the matter unresolved by advancing a series of meritless contentions as to why some future case might provide a superior vehicle for deciding the question, and by urging, with more courage than conviction, that the Secretary's unlikely construction of Section 7907(a) is not only correct but unambiguously so.

The Secretary's submission is at war with the principle that State and local school officials have a right to "clear notice," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006), of the obligations Congress seeks to impose on them through Spending Clause legislation. With the splintered decision below, the question whether the NCLB provides clear notice of the enormous financial obligations the Secretary has been imposing on States and local governments has been left unsettled and unclear. This Court should resolve that question.

I. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE WITH MAJOR FINANCIAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS

The Secretary seeks to ward off this Court's review by suggesting that the Court could more effectively resolve this question of statutory construction in some hypothetical case in which a school district had sought approval of an amendment to its NCLB compliance plan and in which a State was a party. *See* Opp. at 10-13. The Secretary does not seriously suggest that the absence of those features makes this case not justiciable; and, as thirteen of the sixteen judges of the *en banc* Court recognized, the case plainly *is* justiciable. *See* Pet. App. 90a-106a (opinion of Cole, J.); *id.* at 127a-137a (opinion of Sutton, J.). Nor, as we now show, do the points raised by the Secretary constitute cogent reasons for this Court to decline review.

A.

The Secretary does not maintain that there was any administrative process that petitioners were required to exhaust; but he argues that the question presented would have less of an "abstract quality," Opp. at 11, if the petitioner school districts had sought to be excused from particular NCLB compliance requirements by proposing amendments to their compliance plans for approval by their States and/or by asking their States to seek the Secretary's approval of amendments to their statewide plans. That point is not well taken: such a case would be a less appropriate vehicle for resolving the fundamental question presented here, as it would

turn on unrelated issues specific to the particular proposed plan amendment.

The question presented in this case is not "abstract," Opp. at 11, merely because it is fundamental; and it can be decided by this Court without having "to determine whether a particular requirement has been 'underfunded.'" Opp. at 11, quoting Pet. App. 182a. As the Secretary suggests, a question of the *latter* kind might "benefit[ ] from some development at the administrative level," *id.*—indeed, it might appropriately be remitted to the Secretary in the first instance; but there will be no point in pursuing an administrative inquiry into "whether a particular requirement has been 'underfunded'" unless and until this Court has disabused the Secretary of his view that the inquiry is meaningless because the Act does not prohibit unfunded mandates.

Thus, "[w]hile further administrative proceedings might sharpen the nature of some of the school districts' claims, they would not alter or make more concrete the nature of the legal question." Pet. App. 129a (opinion of Sutton, J.).

B.

The Secretary claims that an "added benefit" of waiting for a case in which a school district has resorted to the plan amendment process would be to "provid[e] the school district's State with an opportunity to consider the district's proposal and address factual issues in the first instance." Opp. at 11-12. But the question this Court is called upon to resolve does not turn on "factual issues." And, given the unanimous view of the *en banc* Court—not questioned in the Secretary's Opposition—that the petitioner school districts have standing, *see* Pet.

App. 91a–95a (opinion of Cole, J.), *id.* at 127a (opinion of Sutton, J.), there is no reason why this Court needs to have before it the views of the States of Michigan, Texas and Vermont before it can decide the pure question of statutory construction presented here. Furthermore, several States participated in the proceedings below as *amici* in support of petitioners, arguing against the Secretary's position, while no State spoke in favor of that position.

II. THE SECRETARY'S ARGUMENTS ON THE MERITS EVADE THE CLEAR STATEMENT RULE THAT GOVERNS SPENDING CLAUSE LEGISLATION AND FALL FAR SHORT OF ESTABLISHING THE CORRECTNESS OF A POSITION THAT WAS REJECTED BY SEVEN OF THE THIRTEEN MEMBERS OF THE *EN BANC* COURT WHO CONSIDERED THE QUESTION

A.

Although the Secretary pays lip service to the "clear notice" requirement of this Court's Spending Clause jurisprudence, he does not shoulder his burden to satisfy that requirement. The most he has to say is that, applying "the traditional tools of statutory interpretation," Opp. at 18, the terms of the statute do not point "overwhelmingly" against his position, *id.*, and "even Judge Cole recognized" that the Secretary's construction might ultimately be shown to be "correct," *id.* Indeed, the Secretary goes so far as to suggest that it is not even necessary for him to establish that the *statute* gives clear notice of the obligations he seeks to impose on States and school districts, because, "to the extent any confusion remained after the Act's passage," Opp. at 18-19, it

was eliminated by the time this suit was filed—*not* because Congress changed or clarified the statute in any way, but because the *Secretary*, who had initially "interpreted NCLB not to impose costs exceeding federal funding," Pet. App. 115a (opinion of Cole, J.), had changed course and had declared "that compliance would not be excused if federal funds proved insufficient," Opp. at 19.

This will not do. "Because [the NCLB] was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83 (1999) (Thomas J., joined by Kennedy, J., dissenting). Those rules dictate that, "[i]f *Congress* intends to impose a condition on the grant of federal moneys, *it* must do so unambiguously," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added), with "clear notice," *Arlington*, 548 U.S. at 300.

B.

Such attempts as the Secretary makes to satisfy those requirements fall far short.

1. The Secretary protests that "Petitioners' argument rests entirely" on "[a] single clause." Opp. at 13, 15. But petitioners are hardly to be faulted for basing their argument on the provision of the Act that speaks directly to this question. By its terms, Section 7907(a) applies to the entire Act. The rule it declares—that States and school districts cannot be required to spend their own funds on compliance—is categorical, and there was no need for Congress to repeat it throughout the statute. Nor does section 7907(a) make an exception, as the Secretary would have it, Opp. at 14, for costs incurred in complying

with "the statutory conditions themselves." Whether the use of State and local funds is in fact a clearly stated "condition" of participation in the NCLB is precisely what must be decided here.

The "location" of Section 7907(a) "alongside a series of other . . . provisions that indisputably define the scope of agency authority," Opp. at 14, does not lend any support to the Secretary's position. Rather, it confirms that one of the fundamental limitations Congress imposed on "the scope of agency authority" is that the Department of Education cannot require a State or school district "to spend any funds or incur any costs not paid for under this Act."

The Secretary points to two NCLB provisions that he describes as "making [certain] obligations under the Act contingent upon specified levels of federal funding," Opp. at 16; and he asserts that from these, States and school districts should have deduced "that statutory obligations *not* defined in terms of expenditures must be complied with [even if] the expenditure of state or local funds turned out to be necessary," *id.* at 16-17 (emphasis in original). Those two provisions cannot bear the weight the Secretary places on them, and do not come close to providing clear notice that, notwithstanding Section 7907(a), States and school districts are under a general obligation to devote their own funds to NCLB requirements.[1]

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[1] The provision allowing States to "suspend the administration of, but not cease the development, of the [NCLB-required] assessments" for one year if the amounts appropriated for certain assessment grants fall below specified levels, 20 U.S.C. § 6311(b)(3)(D), simply sets priorities for the use of *federal* funds; it does not suggest that States or school districts must use their own funds for test "development" activities. And

2. The Secretary maintains that we have "fundamentally misunderst[oo]d the statutory scheme," because, under the NCLB, "there are no 'federally mandated compliance costs.'" Opp. at 15, quoting Petition at 4. That amounts to a contention that the prohibition in Section 7907(a) against "mandat[ing] a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act" has no meaning, because no "[ex]pend[itures] . . . or . . . costs" incurred by a State or school district in complying with the NCLB can ever be regarded as federally mandated. That cannot be correct.

In point of fact, under the NCLB States and school districts are subjected to many highly specific compliance obligations, including, for example, the obligation to administer seventeen different annual standardized tests that must satisfy a host of statutory criteria. *See* Petition at 6-7. To be sure, the extensive school improvement requirements that are triggered by the test scores—after those scores have been disaggregated into the NCLB-prescribed subgroups—permit States and school districts to select from a list of options. *See id.* at 7. But any option that will achieve the results required by the statute will be costly, and "it is naive to suggest states and school districts can achieve the[ ] ends [required by the statute] without adequate financial assistance from

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the provision requiring States to participate in certain assessments under the National Assessment of Educational Progress ("NAEP") "if the Secretary pays the cost of administering such assessments," *id.* § 6311(c)(2), simply clarifies that State participation in the NAEP, which previously had been subject to agreements entered into by the Secretary on a state-by-state basis, *id.*, § 9622(d)(3), now is subject to a uniform requirement of federal funding.

the federal government." *Amicus Curiae* Brief of the Governor of the Commonwealth of Pennsylvania, in *School District of the City of Pontiac v. Secretary of the U.S. Department of Education*, 6th Cir. No. 05-2708, at 14-15.

This is not to say that there will never be room to dispute whether a particular expenditure by a State or school district is properly viewed as having been mandated by the Federal Government through the NCLB. But that question is similar to, and no more daunting than, the inquiry the Secretary now makes as a matter of course under the maintenance-of-effort and supplement-not-supplant provisions that have long been a feature of federal education funding. *See generally* 20 U.S.C. §§ 6321, 7217, 7901. By requiring that federal funding be used to "supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds," *Felton v. Secretary, United States Dep't of Educ.*, 739 F.2d 48, 50 (2d Cir. 1984), Congress for many years has charged the Secretary with making complex judgments as to the State and local programs "that would have been available," *id.*, in the absence of federal funds. *See generally Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) (upholding Secretary's order requiring a state to return federal funds that had been used to supplant state expenditures).

For these reasons, the Secretary's contention that all NCLB compliance costs should be regarded as the unalloyed "spending choices" of States and school districts themselves rather than as the result of any federal mandates, Opp. at 15, hardly has such force as to make it "inconceivable that States would believe," *id.*, that Section 7907(a) means what peti-

tioners contend it means. After all, that is precisely what the *amici* States informed the court below they *did* believe the Act to mean when they decided to participate in the NCLB programs. *See* Petition at 10-11. And as those States explained, "[g]iven the breadth of the Secretary's waiver authority and overall authority over the implementation of the Act, there is simply no reason why the requirements of the Act cannot be implemented within the constraints of [Section] 7907(a)]." *Amicus Curiae* Brief of the States of Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin and the District of Columbia, in *School District of the City of Pontiac, et al. v. Secretary of U.S. Department of Education*, 6th Cir. No. 05-2708, at 9.

3. Finally, the enforcement concerns raised by the Secretary are of consequence only to the extent that the Federal Government fails to appropriate adequate funds to carry out the programs mandated by the NCLB. But the Act should not be interpreted on the assumption that it will be severely underfunded, and it is unreasonable to suggest that States and school districts had clear notice that Congress fashioned their compliance obligations under the Act with such an objective in mind.

In any event, the Secretary's submission, while exaggerating the difficulties that petitioners' view supposedly presents in the context of underfunding, fails to acknowledge the harm to States and school districts that flows from the *Secretary*'s interpretation. The Secretary does not deny that under his reading of the Act, States and school districts that participate in the NCLB programs can be required to pay anywhere from zero to one hundred percent of the costs, depending on the amount of funding

the Federal Government chooses to appropriate. But the Secretary blithely suggests that this is no problem, because a State or school district that is not satisfied with the amount of federal funding that is made available in any given year can simply cease its participation in the NCLB programs. *See* Opp. at 19 (arguing that "each year the States are informed of their annual funding allotments under NCLB programs," and can make a new decision whether to "voluntarily accept[ ] those federal funds"). That suggestion is contrary to reality, as it ignores the multi-year nature of NCLB commitments. If a State or school district starts the process of developing the seventeen separate standardized tests required by the Act, or of implementing the Act's comprehensive school improvement requirements, only to be confronted in subsequent years with grossly inadequate levels of federal funding, giving the State or school district the theoretical right to walk away hardly solves the problem.

This is anything but a speculative concern. "[W]hile NCLB promised dramatic funding increases from 2002 through 2007, the funding levels actually requested by the president and appropriated by Congress . . . remained relatively stagnant," even as compliance costs "continue[d] to escalate." *Amicus Curiae* Brief of the Governor of the Commonwealth of Pennsylvania, *supra*, at 9-10. On the Secretary's theory, in such circumstances the NCLB leaves States and school districts a Hobson's choice: they must either divert their own resources to fill the gap in federal funding, or incur the waste, disruption and cost of dismantling programs in midstream.

The alternative posited by petitioners' construction of Section 7907(a)—that, when federal funding is insufficient, States and school districts may continue to participate in the NCLB programs, but with their compliance obligations tempered so that they are not forced to replace federal funding with State or local funding—surely does not "def[y] common sense," Opp. at 18 (quoting *Pennhurst*, 451 U.S. at 24). Petitioners' construction not only gives section 7907(a) its plain meaning, but is more reasonable than a construction under which the financial obligations of State and local governments with respect to NCLB compliance rise and fall without limit depending upon the vagaries of the federal appropriations process. The NCLB did not give States and school districts clear notice that, by choosing to participate in the statutory programs, they were committing themselves to financial obligations that would be determined in such an arbitrary and unpredictable manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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